transaction." COMMISSION, Black's Law Dictionary (11th ed. 2019). Black's also defines an incentive pay plan as "a compensation plan in which increased productivity is rewarded with higher pay." INCENTIVE PAY PLAN, Black's Law Dictionary (11th ed. 2019). Based solely on these definitions, Plaintiff's commission qualifies as an "incentive payment". Both commissions and incentive payments link payment with outcome. Increased sales performance directly corresponds to increased commission payments. As a result, there can be little doubt that Plaintiff's commission constitutes an incentive payment.

In addition to a plain reading of the terms, "commission" and "incentive payments", Ohio case law confirms that a sales commission is an incentive payment. The Ohio Supreme Court held that a payment is an incentive when it is prospective and connected to a desired outcome. *See In re Application of Ohio Edison Co.*, 157 Ohio St. 3d 73, 78 (2019). Given that the commission received by Plaintiff was conditioned on his sales, and there was a direct nexus between the amount of product/services he sold and the compensation he received, his commissions fall within the language of Section 4 of the Separation Agreement, entitling Defendant to 50% of Plaintiff's bonuses and incentive pay. In its *Ohio Edison* decision, the Supreme Court specified that an incentive is meant to induce action a person otherwise might not take. The purpose of a commission program in a sales setting is to encourage a salesperson to sell product or services that he or she might otherwise not sell. If the program were not meant to induce action, actual outcome would not be the basis for the increased compensation.

III. Commission as Bonus Pay

A gross bonus, as referenced in the Separation Agreement, is what is paid in addition to what the employee would normally expect to receive. *Avakian v. Avakian*, 11th Dist. Portage, 2015-Ohio-2299, at ¶ 48. "A 'bonus' is defined as: 'A premium paid in addition to what is due or

expected. In the employment context, workers' bonuses are not a gift or gratuity; they are paid for services in addition to or in excess of the compensation that would ordinarily be given.'" *Id.* at ¶ 47 (citing Black's Law Dictionary 144 (7th Ed. 2000)). In *Avakian*, the separation agreement at issue entitled a spouse to a percentage of her husband's bonuses. *Id.* at ¶ 45. The husband in that case contended that Long Term Incentive Payments were not bonuses. *Id.* at ¶ 11. The court held that the payments were bonuses, even though they were called by a different name, because they were given in addition to what would normally have been expected. *Id.* at 48. Because the commissions received by Plaintiff are in addition to his base salary, they qualify as a bonus under Ohio law. In addition, Plaintiff's commissions are paid for the activity of selling products or services and are not merely a gift or gratuity.

Ohio courts have held that bonuses are payment for past services. *See Kaechele v. Kaechele*, 35 Ohio St. 3d 93, 96 (1988); *Derrig-Heacox v. Heacox*, 8th Dist. Cuyahoga, 2017-Ohio-5743, at ¶ 20. Bonuses are not based on an employee's time or effort. *Derrig-Heacox* at ¶ 20. The court in *Derrig-Heacox* ruled that any money paid to the husband for past services was a bonus. *Id.* at ¶ 24. Time and effort have no place in the calculation of commission awards. Instead, it is calculated based upon performance outcomes. Because commissions are awarded retrospectively, based upon actual results, commissions fall under this definition of a gross bonus.

IV. Intent of the Parties

Separation agreements are interpreted according to contract law, even after being incorporated into a decree by the court. *Mikoch v. Mikoch*, No. 71936, 1997 Ohio App. LEXIS 5325, at *4 (8th Cir. Nov. 26, 1997). Although other cases have differentiated contracts from separation decrees when it comes to *enforcement*; these cases do not apply to the *interpretation*

of a separation decree. *See Holloway v. Holloway*, 130 Ohio St. 214, 198 N.E. 579 (1935) (separation agreement is not a mere contract for purposes of enforcement when it becomes part of a decree); *Wolfe v. Wolfe*, 46 Ohio St.2d 399, 350 N.E.2d 413 (1976) (obligations for alimony and child support are enforced under decree, not as a contract). When a separation agreement is incorporated into a court decree, the agreement should be interpreted pursuant to contract law. *Klug v. Klug*, No. 18507, 2001 Ohio App. LEXIS 1628, at *8-9 (2d Cir. April 6, 2001).

Separation agreements, like contracts, are interpreted according to the intention of the parties as evidenced by contractual language. *Michoch* at *4. The court should look at the language expressed in the "contract" to determine the intent of the parties.

In this case, by using the terms, "gross bonus" and "incentive payments", entirely in lowercase, with no quotations, special emphasis, or reference to a specific job, position, or time period, it can reasonably be concluded that the intention of the Parties was that the terms would apply not only to Plaintiff's job at the time of separation but to future employment as well. The terms were meant to encompass all bonuses and incentive payments, regardless of the precise name given to such additional compensation by the employer. To conclude otherwise would be to open the door to the possibility of collusion between a divorcing spouse and his or her employer by agreeing to characterize additional compensation as something other than what is precisely referenced in a separation agreement.

Moreover, following Defendant's filing of her Motion for Contempt, Plaintiff began paying Defendant 50% of payments listed as "Inspire Cash" and "Spiff" on his paystub. Plaintiff's paystub for the quarter of January 1, 2020 to April 1, 2020 is attached as Exhibit B. Opposing counsel acknowledged that these payments were incentive payments, further demonstrating that the terms, as used in the Separation Agreement, were meant to be flexible to encompass future,

unknown employment and compensation arrangements. *See* Letter from Plaintiff's Counsel dated May 12, 2020 and attached as Exhibit C. Given that the parties intended that the terms "gross bonus" and "incentive payments" were meant to be flexible to adapt to changing employment and compensation circumstances, it can reasonably be concluded that the Parties intended, when entering into the Separation Agreement, that commissions be classified as gross bonus or incentive payments.

When a dispute over terms arises in a separation agreement, the court has the authority to clarify any confusion or disagreement. *Klug* at 8-9. If a term is ambiguous, the court can consider not only the intentions of the parties, but what is equitable in the situation before the Court. *Id.* at 9. A term is ambiguous when it is open to several interpretations. *Id.* at 14. Given the two competing interpretations by Plaintiff and Defendant, it is possible that the court may find that the terms, "bonus" and "incentive payment", are ambiguous. If the Court so finds, it is equitable in the present situation to award Defendant 50% of Plaintiff's commissions in view of the Plaintiff's increased compensation in addition to his base salary.

V. Extrinsic Evidence

Plaintiff has not provided documentation requested by Defendant regarding bonus and incentive pay Plaintiff received at the time of the execution of the Separation Agreement, so an interpretation of the Parties' intent at that time based upon extrinsic evidence cannot be proffered by Defendant at this time. If Plaintiff continues to maintain that his commissions are not a gross bonus or incentive payment, Plaintiff must provide Defendant with additional documentation. Although Plaintiff maintains that the commissions Plaintiff receives from his current employer are not gross bonus or incentive payments, Plaintiff has failed to provide any of the documentation requested by Defendant as to how his commissions are calculated. Given that

Plaintiff has conceded that the programs, Inspire Cash and Spiff, are bonuses or incentive payments, there is compelling reason to believe that Plaintiff's commissions fall under that category as well. Plaintiff must produce the requested documents to allow the Court to decide whether Plaintiff's commissions constitute gross bonus or incentive payments.

VI. Conclusion

Based upon the foregoing reasons, Plaintiff's commission pay is governed by the Separation Agreement's clause on "gross bonus or incentive payments." Plaintiff should be held in contempt for his failure to provide Defendant with 50% of his commissions, and Plaintiff should be ordered, pursuant to the express terms of the Settlement Agreement, to immediately and directly pay Defendant for the portion of Plaintiff's bonuses and incentive payments to which she is entitled. If, alternatively, the court finds that the plain reading, definitions, and case law are insufficient to classify Plaintiff's commissions as gross bonus or incentive payments, Defendant requests that the Court order the Plaintiff to provide the additional documentation requested by Defendant regarding the intent of the parties at the time of the execution of the Separation Agreement, as well as the details of the commission program at Defendant's current employer, Apple.

L. McCready Writing Sample

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

John Doe,	:
Plaintiff,	:
-v-	:
Jane Doe,	:
Defendant.	:

AGREED ENTRY PERTAINING TO DEFENDANT'S MOTION FOR CONTEMPT REGARDING SPOUSAL SUPPORT

This matter comes before the court pertaining to the Motion for Contempt filed by Defendant Jane Doe ("Defendant") regarding Spousal Support owed by Plaintiff John Doe ("Plaintiff"). The Separation Agreement, approved and incorporated into the Decree of Divorce (the "Decree"), was filed on March 13, 2017. By agreement of the parties, and for good cause shown, the Court hereby ORDERS the following:

Plaintiff shall pay Defendant $82,088.74 for spousal support obligations owed to Defendant as a result of his bonus and incentive payments received from January 2018 through September 2020. Plaintiff shall pay the sum of $82,088.74 to Defendant in the following manner:

> Within ten (10) days after the effective date of this Entry, Plaintiff shall, by cashier's check, pay to Defendant a sum in the amount of $27,500. On January 15, 2021, Plaintiff shall pay to Defendant a sum in the amount of $27,500 by cashier's check. Plaintiff shall pay the remaining $27,088.74 through monthly payments to Defendant. Beginning in October 2020, Plaintiff shall pay Defendant installment

payments in the amount of $1,041.87 per month for 26 months, until the total amount owed is satisfied.

These monthly payments shall not terminate when Plaintiff's other spousal support obligation terminates. This spousal support obligation shall not be terminated for any reason until paid in full by Plaintiff including, but not limited to, Plaintiff's loss of employment or Defendant's remarriage or cohabitation. Further, any payments from Plaintiff to Defendant prior to the filing of this Agreed Entry shall not be considered payment of this obligation; this includes, but is not limited to, prior payment from Plaintiff to Defendant for bonuses and incentives from January 2018 to September 2020 totaling $11,037.26.

Defendant's monthly spousal support in the amount of $1,500.00 shall continue through November 2021 pursuant to the terms set forth in the Parties' Separation Agreement. Plaintiff shall continue to pay to Defendant 50% of his bonus or incentive payments, including commissions, from September 2020 to the termination of the spousal support obligation in November 2021. For purposes of determining the amount owed to Defendant, the terms "bonus" and "incentive payment" shall include, but are not limited to, Bonuses, Commissions, Inspire Cash, and Spiff payments and the like that Plaintiff receives from his current employer and bonuses, commission, incentive payments and the like that Plaintiff receives from his future employers. Bonus, incentives, and commission shall be paid by Plaintiff to Defendant by the 15th day of the month following Plaintiff's receipt of payment for said bonus, incentive, commission payments or the like. Plaintiff shall provide Defendant his paystubs monthly for calculation of bonus, incentive, and commission payments.

The effective date of this Entry shall be the date on which it is filed with the Court. The remaining provisions contained in the Separation Agreement approved and incorporated into the Decree of Divorce on or about March 13, 2017 shall remain in full force and effect.

Applicant Details

First Name	**Charles**
Last Name	**McKee**
Citizenship Status	**U. S. Citizen**
Email Address	**cmckee@law.gwu.edu**
Address	**Address** Street **770 5th Street NW Apt 218** City **Washington** State/Territory **District of Columbia** Zip **20001**
Contact Phone Number	**5135322587**

Applicant Education

BA/BS From	**Washington & Lee University**
Date of BA/BS	**May 2015**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 1, 2022**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Clark, Bradford
bclark@law.gwu.edu
(202) 337-1707
Suter, Sonia
ssuter@law.gwu.edu
Davis, Andrew
andrew_davis@judiciary-rep.senate.gov
8064705599

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Charles McKee
770 Fifth Street NW Apt. 218 | Washington DC 20001 | 513-532-2587 | cmckee@law.gwu.edu

February 17, 2022

The Honorable John D. Bates
Senior United States District Court Judge
U.S. District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue, Northwest
Washington, DC 20001

Dear Judge Bates:

I am a third-year law student at the George Washington University Law School and will be graduating in May 2022. I am writing to apply for a judicial clerkship with you for the 2022-2023 Term.

Through my academic and professional experiences, I have developed strong research and writing skills that would allow me to contribute immediately as a clerk. Most recently, as a summer law clerk with the Texas Attorney General's office, I wrote research memoranda on issues of civil procedure, administrative law, and constitutional law. I also drafted portions of filings for litigation with the federal government and for private-party enforcement actions. In District Judge Trevor McFadden's chambers last fall, I researched cases involving labor and employment law, contract law, and criminal law and contributed to opinions for various cases. While I was a law clerk for the United States Senate Committee on the Judiciary, I prepared recommendations on legislative proposals such as immigration reforms and exceptions to the Foreign Sovereign Immunities Act. These assignments, in addition to my service on the George Washington University Law Review, have sharpened my research and writing skills, as well as my ability to understand and interpret statutory language.

I am eager to apply these skills as a clerk in your chambers. I would be pleased to discuss my qualifications with you in further detail. I am including a resume, transcript, and a writing sample in this application. The law school's clerkships office is separately forwarding letters of recommendation. Thank you for your time and consideration.

Sincerely,

Charles McKee

CHARLES "MAC" MCKEE

770 Fifth Street NW, Apartment 218 | Washington, DC | 513-532-2587 | cmckee@law.gwu.edu

EDUCATION

The George Washington University Law School **Washington, D.C.**
J.D. Candidate (3.76 GPA) (expected) May 2022
Activities and Honors: George Washington Scholar (Top 1-15% of Class); Associate, The George Washington Law Review; Dean's Recognition for Professional Development; Vice President for Social Events, The GW Federalist Society

Washington and Lee University **Lexington, VA**
B.S. in Business Administration. Minor in Creative Writing May 2015
Activities and Honors: Honor Roll; Dean's List; Fiction Editor, Muse; Editorial Intern, Shenandoah: The Washington & Lee University Review
Awards: 1st Place, Washington and Lee Entrepreneurship Summit Business Plan Competition

PROFESSIONAL EXPERIENCE

Special Litigation Unit, Office of the Attorney General of Texas Austin, TX
Law Clerk May – July 2021

- Researched and drafted portions of briefs for ongoing litigation with the federal government and enforcement actions against private defendants.
- Prepared research memoranda on issues in immigration law, administrative law, and environmental torts.

Chambers of Hon. Trevor N. McFadden, U.S. District Court for the District of Columbia Washington, D.C.
Judicial Intern August – November 2020

- Prepared research memoranda for law clerks and the judge on issues including personal jurisdiction for defunct corporations, arbitration for union employees, and contract disputes in insurance law.
- Drafted portions of opinions for cases arising under the Family Medical Leave Act, the Employee Retirement Income Security Act, and the First Step Act.

U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution Washington, D.C.
Law Clerk May – August 2020; January – April 2021

- Researched and prepared briefing papers related to COVID-19, police reform, and judicial nominees.
- Analyzed and made recommendations for the senator's vote on pending legislation covering immigration, the Foreign Sovereign Immunities Act, and liability immunity for online platforms.

The Fund for American Studies Summer Law Fellowship Washington, D.C.
Legal Fellow May – July 2020

- Participated in a fellowship program including a summer course on originalism, networking with diverse practicing attorneys, and lectures from sitting federal judges.

National Republican Campaign Committee Washington, D.C.
Research Assistant March 2017 – December 2018

- Researched public and legislative records, public law, federal lawsuits, and television and print media to prepare detailed research reports on incumbent members of and candidates for Congress.

Office of Representative Patrick McHenry Washington, D.C.
Congressional Intern January – March 2017

- Provided research and assistance to legislative staff, researched and wrote issue-specific correspondence.

Portman for US Senate Cincinnati, OH
Deputy Field Director June – November 2016

Teaching Assistant Program in France Paris, France
English Teaching Assistant September 2015 – April 2016

LANGUAGES, INTERESTS, AND OTHER ACCOMPLISHMENTS

- Fluent in French | Proficient in Spanish
- Fiction Writing
- Woodworking
- Eagle Scout

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

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Date of Birth: 21-JUL

Date Issued: 14-FEB-2022

Record of: Charles H McKee

Page: 1

Student Level: Law
Admit Term: Fall 2019

Issued To: CHARLES MCKEE
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WASHINGTON, DC 20001-2647

REFNUM:68308652

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2019			
Law School			
Law			
LAW 6202	Contracts Roberts	4.00	A-
LAW 6206	Torts Suter	4.00	A
LAW 6212	Civil Procedure Clark	4.00	A
LAW 6216	Fundamentals Of Lawyering I Levine	3.00	A
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.911			
CUM 15.00 GPA-Hrs 15.00 GPA 3.911			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Spring 2020			
Law School			
Law			
LAW 6208	Property Overton	4.00	CR
LAW 6209	Legislation And Regulation Schaffner	3.00	CR
LAW 6210	Criminal Law Braman	3.00	CR
LAW 6214	Constitutional Law I Cheh	3.00	CR
LAW 6217	Fundamentals Of Lawyering II Levine	3.00	CR
Ehrs 16.00 GPA-Hrs 0.00 GPA 0.000			
CUM 31.00 GPA-Hrs 15.00 GPA 3.911			
Good Standing			
...			
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
********** CONTINUED ON NEXT COLUMN **********			

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
Law School			
Law			
LAW 6351	Reading Group Pepe	1.00	CR
LAW 6360	Criminal Procedure Lerner	3.00	B+
LAW 6400	Administrative Law Siegel	3.00	A-
LAW 6668	Field Placement	3.00	CR
LAW 6669	Judicial Lawyering Iscoe	2.00	B+
Ehrs 12.00 GPA-Hrs 8.00 GPA 3.458			
CUM 43.00 GPA-Hrs 23.00 GPA 3.754			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Spring 2021			
LAW 6250	Corporations Fairfax	4.00	B
LAW 6380	Constitutional Law II Colby	4.00	A+
LAW 6511	Anti-Corruption And Compliance Tillipman	2.00	B
LAW 6667	Advanced Field Placement Brown	0.00	CR
LAW 6668	Field Placement Tillipman	3.00	CR
Ehrs 13.00 GPA-Hrs 10.00 GPA 3.533			
CUM 56.00 GPA-Hrs 33.00 GPA 3.687			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Fall 2021			
LAW 6230	Evidence Braman	3.00	A
LAW 6342	Trusts And Estates Edmisten	3.00	CR
LAW 6520	International Law Steinhardt	4.00	A
LAW 6555	Comparative Constitutional Law Fontana	3.00	A
Ehrs 13.00 GPA-Hrs 10.00 GPA 4.000			
CUM 69.00 GPA-Hrs 43.00 GPA 3.760			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
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Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
Law School			
Law			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2021			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Fall 2021			
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	1.00	
Spring 2022			
LAW 6218	Professional Responslbty/Ethic	2.00	----------
LAW 6232	Federal Courts	4.00	----------
LAW 6648	Negotiations	3.00	----------
LAW 6652	Legal Drafting	2.00	----------
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	12.00	

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	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	69.00	43.00	161.67	3.760
OVERALL	69.00	43.00	161.67	3.760

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All courses are taught in semester hours.

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Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

The George Washington University Law School
2000 H. Street, N.W.
Washington, D.C. 20052

February 17, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing to recommend an excellent candidate for a clerkship in your chambers. Charles “Mac” McKee is a member of the GW Law Class of 2022 and has a cumulative G.P.A. of 3.754. Based on Mac’s outstanding performance in my Civil Procedure class, I believe that you would find him to be a highly successful law clerk.

I first met Mac when he was a student in my fall 2019 Civil Procedure class. This was a small section of approximately 35 students, so I had a chance to interact with Mac closely. Mac was always attentive in class and well prepared. He earned an A in the course and his final exam was one the best in the class. This was no accident. In graded courses during his first semester, Mac earned three As and one A-, giving him an impressive GPA of 3.911 and placing him near the very top of his Class.

When classes went online during the Covid-19 pandemic, however, Mac’s grades slipped somewhat. I asked him about this, and he shared that he found the online environment less conducive to interaction and engagement both with his professors and with the subject matter of the courses. He told me that he was redoubling his efforts this semester to learn online and felt that he was making good progress. In light of these circumstances, I believe that Mac’s first-semester GPA of 3.911 is more representative of his true capabilities than is overall GPA.

Mac has gained valuable writing and research experience as a member of The George Washington Law Review. He also is more mature than the average law student, having worked for a several years before attending law school. This real-world experience is reflected in the seriousness with which he approaches his studies and his strong work ethic. Given his maturity and substantial work experience, I am confident that you would find him to be an excellent law clerk on day one.

I should add a few words about Mac’s personality and demeanor. Mac is mature, down to earth, and friendly. I have no doubt that he would get along with everyone in your office and could readily handle any situation with intelligence and professionalism. In sum, I strongly recommend Mac for a clerkship in your Chambers.

Sincerely,

Bradford R. Clark
William Cranch Research Professor of Law
Direct (202) 994-2073
bclark@law.gwu.edu

The George Washington University Law School
2000 H. Street, N.W.
Washington, D.C. 20052

February 17, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing a letter in strong support of Charles McKee's application for a judicial clerkship with you in 2022. Having had Charles as a student in my Torts class in the fall of 2019, I am sure that he would make a fine judicial clerk.

Charles was one of 87 students in his Torts class. Although I had a total of 200 students (including another large Torts class), I had a good sense of Charles's intellectual abilities because he was such an active participant in class. Throughout the semester, it was clear that he was engaged with the material. He frequently offered his perspectives when I asked the class questions about policy issues or the black-letter law. Even among a group of peers who were quite interactive and willing to participate, Charles stood out. His comments were intelligent and thoughtful and moved the discussion forward in productive ways. They also demonstrated intellectual enthusiasm and a clear interest in learning more than just the legal doctrine. It was evident Charles was thinking broadly about the policy implications of a particular ruling and how the doctrine might fit within the larger scope of the law. He also was adept at thinking about how a rule would apply in new circumstances. In other words, legal thinking seemed to come easily to him.

Based on Charles's reliable and consistently strong performance in class, I expected him to do well on the final examination. And indeed, he did. His total score for the exam was 1.2 standard deviations above the mean, which was the fifth highest score in a class of 87 students. The exam included two long, issue-spotting essay questions and difficult multiple-choice questions that required careful reading and analytic reasoning. Charles's performance was especially strong on the essay questions for which he earned scores of 1.5 and 1.7 standard deviations above the mean. I do not add up the total points of the exams until I am done grading all essays, but I made a note to myself after grading his essays that they were thorough, well written, and should earn high scores. He also demonstrated strong knowledge of the black-letter law in earning a score that was 0.8 standard deviations above the mean for the difficult multiple-choice questions. In short, his examination evidenced his command of the material, and, just as important, his legal analytic skills and ability to express his ideas clearly.

My sense of Charles based on our classroom interactions and his exam performance makes me confident that he has the skills one would want in a law clerk. He is bright, motivated, intellectually curious, engaged, and hard working. He thinks well; he can process, analyze, and write about complex information quickly; and he engages in high level discussions about the law thoughtfully and creatively. In addition, Charles is respectful and willing to assert his views while also listening and being responsive to his peers. I am certain that he would offer rich contributions to discussions in chambers about matters before the court.

Not only does Charles have the qualities necessary to be a strong law clerk, but he would also approach the position with great enthusiasm. He has told me how much he enjoyed interning for Judge McFadden at the U.S. District Court of the District of Columbia. One of the appeals of clerking for him is his desire to assist the court in working through new areas of law and considering how abstract legal principles apply to particular parties and disputes. In addition, he enjoys legal research and writing, and he welcomes the many intellectual challenges of clerking, including familiarizing himself with new subject matter and distilling relevant facts and legal concepts from the "background noise" to get at the heart of an issue.

Although I did not get to know Charles very well outside of class, my impression of him as a person is positive. He engages nicely with peers and professors and manages to be an active participant in class without dominating discussions. I would imagine that he would work well with his colleagues, support staff, and supervisors in a clerkship and as a lawyer. For all of these reasons, I am confident that he would be a strong asset as a law clerk in your chambers.

If you have any questions about Charles's application, please feel free to contact me at ssuter@law.gwu.edu or 202-994-9257.

Sincerely,

Sonia M. Suter, J.D., M.S.
Professor of Law and Kahan Family Research Professor of Law
Founding Director, Health Law Initiative

February 17, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I write in strong support of Charles (Mac) McKee's application to be a law clerk in your chambers. I hired Mac to serve in Senator Cruz's judiciary committee office for the summer after his 1L year, and he did such an outstanding job that I welcomed him back for the spring semester of his 2L year. I have no doubt that, if he joins your chambers, he will prove just as valuable to you.

Mac is exceedingly bright and a hard-worker, but because I believe those traits are readily apparent from his resume and transcript, I instead want to focus on two separate but related qualities that perhaps you would otherwise miss: his ability to provide appropriately calibrated work-product, and his ability to see the larger picture.

Mac distinguishes himself from other hard-working, sharp, and eager law clerks in our office with his ability to consistently provide work product that meets the precise needs of the office. He understands that not every issue or assignment demands a treatise on an area of law or policy, so when an issue is straight-forward, he quickly provides a short, crisp answer. He also understands that some issues are extraordinarily complex, and so provides insightful, creative, and well-written analysis on difficult issues. This ability to quickly and correctly dispose of straight-forward matters while identifying and providing thoughtful analysis on more complex matters is invaluable.

He also distinguishes himself with his ability to see the larger picture, including subtle connections between different areas of law and policy. When analyzing a bill or answering a legal research question, many law clerks lose sight of how the bill or legal issue at hand interacts with the wider world. Not Mac. Mac will explain how an effort to protect free speech could negatively affect the free exercise of religion, or how an issue of congressional power also implicates federal court jurisdiction. When I assign an issue to Mac to analyze, I am confident that he will provide an answer that spots all the relevant issues and doesn't miss the forest for the trees.

Finally, I would be remiss not to say what a joy it is to work with Mac. Every member of our team works closely with one another, and everybody loves Mac. He is exceedingly easy to get along with, provides a calm presence in the office, and has a great sense of humor.

As someone who clerked for a federal district court judge and has supervised multiple individuals who have clerked or will clerk for federal district judges, I would like to think that I have developed a good sense of the qualities it takes to succeed as a clerk. With that in mind, I strongly recommend Mac. I believe that his intelligence, work-ethic, judgment, and personality will be an asset to any chambers fortunate enough to have him.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Andrew Davis
Chief Counsel to Senator Ted Cruz
807 Hart Senate Office Building
Andrew_Davis@Judiciary-Rep.Senate.gov
Office: (202) 228-1110
Personal: (806) 470-5599

Charles McKee
770 Fifth Street NW Apt. 218 | Washington DC 20001 | 513-532-2587 | cmckee@law.gwu.edu

Writing Sample

The following writing sample is a research memorandum I prepared while working as a judicial extern for the Hon. Judge Trevor N. McFadden on the United States District Court for the District of Columbia in the Fall of 2020. Pursuant to court policy, I have changed all identifying information, including party names, case numbers, and other specific facts from the case. I have received permission from Judge McFadden to use this memo as a writing sample.

RESEARCH MEMORANDUM

From: Mac McKee
To: Supervising Law Clerk
Date: 11/23/20
Re: Overwatch Fin. Serv., LLC v. Construction Assigned Risk PCC et al

---

A group of the Reinsurer Defendants in this case, including Insurance Company A and Insurance Company B (the "Power's Reinsurers"), and Jerrell Re, have filed a Motion for Partial Summary Judgment. Mem. in Supp. of Power's/Jerrell Reinsurers' Mot. for Part. Summ. J., ECF No. 150-1 ("Jerrell Mot."). Jerrell argues the plaintiff should be barred from making its implied contract, promissory estoppel, and unjust enrichment claims under the doctrines of judicial and collateral estoppel. *Id.* at 12-22.[1] Plaintiff Overwatch Financial Services, LCC ("Overwatch") has responded with its own cross-motion for summary judgment arguing that both judicial and collateral estoppel are inappropriate. Mem. in Supp. of Overwatch's Cross Motion for Part. Summ. J. ("Overwatch Mot."), ECF No. 154-1.

This memorandum summarizes the facts of the case and of motions currently before the Court. It also recommends that the Court should reject the judicial and collateral estoppel arguments in Jerrell's Motion for Partial Summary Judgment.

SUMMARY OF CASE

Overwatch extended a $50 million line of credit to a construction company. First Amended Compl. ("FAC") ¶ 103. Overwatch insured this loan through defendant Construction Assigned Risk ("CAR") up to $25 million dollars. *Id.* ¶ 17. CAR was formed for the sole purpose of providing reinsurance-backed credit insurance to Overwatch. *Id.* ¶ 25. Pursuant to the Credit Insurance Policy with Overwatch, CAR sought to reinsure 90% of the insured amount.

[1] Page numbers are those generated by the CM/ECF system.

Id. ¶ 23. Broker Limited, Broker Re Inc., and Broker Management, Ltd. ("Broker Defendants") helped CAR secure reinsurance capital by brokering reinsurance contracts (the "reinsurance treaties") with several companies including Jerrell Re, the Power's Reinsurers, Windsor Re, Tudor Re, and Stuart Re (together, the "Reinsurer Defendants"). *Id.* ¶ 39.

CAR and the Broker Defendants provided Overwatch with several Credit Insurance Binders which detailed the terms of the primary insurance and confirmed the existence of reinsurance "on the same terms, conditions, and settlements as the original policy". *Id.* ¶ 47. The binder listed reinsurers (including the Reinsurer Defendants here) and the shares of the reinsurance capital each agreed to provide in the event of a claim. *Id.* ¶ 52.

Then the construction company defaulted, went bankrupt, and Overwatch filed a claim to collect on its insurance policy from CAR. FAC ¶¶ 91-92. CAR denied the claim based on Overwatch's purported failure to comply with a collateralization requirement in that policy. *Id.* ¶ 19. But an arbitration panel determined that Overwatch had met its obligations and that CAR thus owed Overwatch $25 million plus interest and costs; the Supreme Court of California confirmed the award totaling more than $29 million plus still-accruing post-judgment interest. *Id.* ¶¶ 21-22.

Overwatch has not yet received the funds. *Id.* ¶ 24. CAR claims its only assets to pay the judgment are a $2.2 million letter of credit and the reinsurance agreements. *Id.* ¶ 144. The Reinsurer Defendants have also refused to pay CAR, claiming that CAR and the Broker Defendants violated the reinsurance treaties by failing to give prompt notice of Overwatch's claim. *Id.* ¶¶ 148-152. Overwatch has tried to demand payment directly from the Reinsurer Defendants, but the latter have denied that Overwatch has any right to do so. *Id.* ¶¶ 158-160.

Overwatch filed their complaint against CAR, the Reinsurer Defendants, and the Broker Defendants. They asserted breach of contract claims against the Reinsurer Defendants, both breach of contract and negligence claims against the Broker Defendants, and sought declaratory judgement against CAR. A flurry of motions followed: the Reinsurer Defendants and the Broker Defendants both moved to dismiss the claims against them. Finding that Overwatch had failed to state a claim for breach of contract, the Court dismissed the claims against the Reinsurer Defendants and the contractual claims against the Broker Defendants. *See* Mem. Op., ECF No. 75. Overwatch then filed for leave to amend its complaint, which the Court granted in part. In doing so, the Court dismissed CAR from the case entirely because Overwatch did not seek relief from CAR directly. *See* Mem. and Order, ECF No. 98.

Overwatch now proceeds with negligence claims against the Broker Defendants for its alleged failure to ensure that CAR met its obligations to the Reinsurer Defendants and claims of breach of contract implied-in-fact, promissory estoppel, and unjust enrichment against the Reinsurer Defendants. *See* FAC ¶¶ 173-215.

PENDING MOTIONS

Several motions remain before the court. The Broker Defendants have moved for summary judgment on Overwatch's negligence claims against them. Jerrell Re and the Power's Reinsures have filed one motion for partial summary judgment. Separately, the other reinsurer defendants have also moved for partial summary judgment. For its part, Overwatch has filed a cross-motion for partial summary judgment in response to the various defendants' motions.

- Power's/Jerrell Reinsurers' Motion for Partial Summary Judgment, ECF No. 180: Jerrell contends that judicial and collateral estoppel should preclude Overwatch from recovering in this case because certain issues have already been decided in arbitration between Overwatch

and CAR and Arbitration between CAR and Jerrell and the Power's Reinsurers. Jerrell separately asserts that Overwatch's implied contract, promissory estoppel, and unjust enrichment claims have no basis in fact and must fail.

- Broker Defendants' Motion for Summary Judgment, ECF No. 161: The Broker Defendants argue that summary judgment is appropriate on Overwatch's negligence claims because no Broker entity owed Overwatch any duty with respect to the Credit Insurance Policy.
- Other Reinsurer Defendants' Motion for Summary Judgment, ECF No. 182: The Other Reinsurer Defendants argue that summary judgment is appropriate because the facts cannot support Overwatch's arguments that the Brokers or CAR were ever agents of the Reinsurers, or that there existed an implied contract between Overwatch and the Reinsurer Defendants.
- Overwatch's Cross Motion for Partial Summary Judgment and in Combined Opposition to Defendants' Motions for Summary Judgment, ECF No. 184: Overwatch seeks summary judgment on a series of issues, including that (1) the language of the Credit Insurance Policy requires the Reinsurer Defendants to pay claims covered by the Credit Insurance Policy; (2) that an enforceable implied contract exists between Overwatch and the Reinsurer Defendants; and (3) that the Brokers owed Overwatch a duty of care.

ANALYSIS OF JERRELL'S JUDICIAL AND COLLATERAL ESTOPPEL ARGUMENTS

I. Judicial estoppel should not bar Overwatch from arguing that CAR is a pass-through entity to the reinsurer defendants at this stage.

Jerrell argues that judicial estoppel should bar Overwatch from arguing CAR "is essentially a conduit or… 'pass-through' to [the Reinsurer Defendants]". Jerrell Mot. at 13. In

response, Overwatch argues that Jerrell has mischaracterized the position it took during its arbitration with CAR. Overwatch Mot. at 46. Judicial estoppel prevents a party from manipulating the legal system by asserting a claim in a proceeding that is inconsistent with a claim it asserted in a previous proceeding. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The D.C. Circuit Court has instructed that three inquiries guide the determination of whether judicial estoppel applies. *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010).

First, the Court should determine whether a party's position clearly inconsistent with its earlier position. *Id.* "Doubts about inconsistency often should be resolved by assuming there is no disabling inconsistency, so that the second matter may be resolved on the merits." *Comcast Corp. v. F.C.C.*, 600 F.3d 642, 647 (D.C. Cir. 2010). Here, Jerrell alleges that in its arbitration with CAR, Overwatch argued that CAR could not "disavow its obligations and duties by characterizing itself as simply a pass-through." Jerrell Mot. at 14. Jerrell further argues this position is clearly inconsistent with Overwatch's current position that CAR was a conduit through which Overwatch and the Reinsurer Defendants entered an implied contract. *Id.* at 13. Overwatch responds that in the arbitration, it took the position that CAR could not portray itself as a pass-through to shirk its obligations to Overwatch as a primary insurer and its obligations to communicate with the Reinsurer Defendants regarding Overwatch's claim. Overwatch Mot. at 47. That position, Overwatch contends, should not preclude it from arguing that CAR is a conduit with regard to any obligations the Reinsurer Defendants may owe Overwatch directly. *Id.* at 47-48. At minimum, the facts here create doubt as to whether Overwatch has taken a position "clearly inconsistent" with the one it tool in arbitration. Because the D.C. Circuit has

held that doubts over inconsistency leads to an assumption that there is no inconsistency, Jerrell should not succeed on this factor.

Second, the later Court must decide if the party succeeded in persuading the earlier tribunal in accepting the earlier inconsistent position. *See Moses*, 606 F.3d at 798. The earlier Court or tribunal only needs to have adopted the inconsistent position; it need not have analyzed how that position affected its decision. *See Temple Univ. Hosp., Inc. v. Nat'l Labor Relations Bd.*, 929 F.3d 729, 735 (D.C. Cir. 2019) (Citing the Supreme Court's approach in *New Hampshire v. Maine*). Jerrell does not point to any direct evidence that the arbitration panel in fact adopted the position it attributes to Overwatch. Instead, it argues that Overwatch had to convince the arbitration panel that CAR was not a pass-through in order to obtain discovery into reinsurance and whether CAR could satisfy the judgment against it. Jerrell Mot. at 15. To Jerrell, this is an admission that "Overwatch's remedy was against CAR, and that CAR's remedy (if any) was against the Reinsurers." *Id.* But as discussed above, this only shows that the panel accepted CAR was not a pass-through with respect to its direct obligations to Overwatch; it does not necessarily demonstrate that the panel's accepted Overwatch's (alleged) argument that CAR was not a pass-through to the Reinsurer Defendants.

Jerrell next cites the proposition that "a lack of evidence that a court did not rely on the party's previous position is sufficient to show that the party 'succeeded in persuading' the court." *See* Jerrell Mot. at 14, *citing Moses v. Howard Univ. Hosp.*, 567 F. Supp. 2d 62, 67 (D.D.C. 2008). However, as Overwatch correctly notes, courts in this Circuit have only applied that rule from *Moses* where debtors have failed to disclose pending legal claims in bankruptcy proceedings. *See e.g. Moses*, 606 F.3d at 799 (Circuit court holding that the bankruptcy court's decision to discharge the plaintiff while the District Court had allowed his suit to continue was

itself evidence that one of the two Courts had been misled). Overwatch, on the other hand, offers evidence that even if it had made the argument Jerrell attributes to it, the arbitration panel did not accept it. Overwatch Mot. at 46. In its decision, the arbitration panel wrote: "The full picture of the formation and capitalization of CAR… is unknown to us (and indeed we foreclosed Overwatch's discovery efforts on that subject) … The sources of funds available to the award may include reinsurers that are not parties to this arbitration.". *Id.* This language suggests that the arbitration panel did not address whether CAR was a pass-through entity and expressly left open the possibility that the Reinsurer Defendants may be required to provide funds to satisfy the arbitration award. Because Jerrell offers no evidence support Overwatch's assertion, this factor favors Overwatch.

Third, the Court must determine whether the party asserting the inconsistent position would derive unfair advantage or impose unfair detriment on the opposing party if not estopped. *See Moses*, 606 F.3d at 798. Had Jerrell established that Overwatch was advancing a position clearly inconsistent with its previous position, it could easily show how Overwatch would derive unfair benefit. Overwatch would have asserted one position to secure an arbitration award against CAR and an inconsistent opinion to secure a judgment against the Reinsurer Defendants. But as discussed above, Jerrell has not shown the arbitration panel adopted the position it attributes to Overwatch or that Overwatch's positions are clearly inconsistent. It thus cannot meet the third factor. Judicial estoppel of Overwatch's claims is inappropriate at this stage.

II. The Court should not bar Overwatch's claim under the doctrine of collateral estoppel.

Jerrell also argues that collateral estoppel should bar Overwatch's claims because, during arbitration between Jerrell and CAR, a panel concluded that CAR's failure to meet its obligation

to the Reinsurer Defendants left Jerrell with no obligation under the reinsurance treaties to pay Overwatch's money judgment. Jerrell Mot. at 17-19. Collateral estoppel requires that (1) the issue is actually litigated, (2) determined by a valid, final judgment on the merits, (3) after a full and fair opportunity for litigation by the parties or their privies, and (4) under circumstances where the determination was essential to the judgment and not merely dictum. *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 794 (D.C. Cir. 2019), citing *Walker v. FedEx Office & Print Servs., Inc.*, 123 A.3d 160, 164 (D.C. 2015).[2] Overwatch argues that collateral estoppel should not apply because the issue of an implied contract between it and the Reinsurer Defendants has not been litigated, and it has not had any opportunity to litigate the issues. Overwatch Mot. at 44-46.

Jerrell argues that Overwatch's claims involve determining whether Jerrell owes Overwatch any liability for its loss and money judgment. Jerrell Mot. at 19. This, Jerrell contends, is the "identical issue" already litigated in the Power's/Jerrell-CAR arbitration, which concluded that Jerrell was not liable under the Reinsurance Treaties for Overwatch's loss. *Id.* For its part, Overwatch argues that the issue it raises here is unrelated to the issue decided in the Jerrell-CAR arbitration, which involved CAR and Jerrell's obligations under the Reinsurance Treaties but did not address any direct obligations Jerrell may owe Overwatch. Overwatch Mot. at 45. Overwatch also correctly notes that the Court has already recognized that the existence of express agreements (the Credit Insurance Policy, the Reinsurance Treaties) does not foreclose the possibility of an implied contract. *See* Mem. Order 7 at 3, ECF No. 126. The Court should

[2] Although the Court has thus far applied D.C. law in this case, Jerrell cites New York law in its argument for collateral estoppel against Overwatch. The law for collateral estoppel in New York is functionally identical to that in D.C. *See* Jerrell Mot. at 18, *citing Westchester Cnty. Correction Officers Benevolent Ass'n v. Cty. of Westchester*, 65 A.D.3d 1226, 1227 (N.Y. 2009).

maintain its position that Jerrell's liability under the Reinsurance Treaties is a separate issue from its liability under an implied contract – and the latter issue has not yet been litigated.

Jerrell also argues that Overwatch had a full and fair opportunity to litigate in the Jerrell-CAR arbitration because although Overwatch was not party to the arbitration, CAR and Overwatch were in privity. Jerrell Mot. at 19-20. Two parties are in privity when they "represent[] precisely the same legal right in respect to the subject matter of the case." *Franco v. D.C.*, 3 A.3d 300, 305 (D.C. 2010). Jerrell contends Overwatch and CAR are privies because their interests are aligned in arguing that Jerrell is liable for Overwatch's loss. Jerrell Mot. at 19-20. That may be true. But in its arbitration, CAR sought to recover from Jerrell under the Reinsurance Treaties. Here, by contrast, Overwatch is trying to assert a legal right under a theory of implied contract. These are distinct rights and are not "conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation." *See Juan C. v. Cortines*, 89 N.Y.2d 659, 667, 679 (1997). Overwatch thus had no opportunity to litigate the issues Jerrell seeks to preclude.

CONCLUSION

Jerrell has failed show that Overwatch successfully took a position in arbitration that was clearly inconsistent to the positions it takes in this litigation. Likewise, it has failed to demonstrate that the arbitration judgment against CAR should have preclusive effect against Overwatch's claims. Accordingly, Jerrell's attempts to invoke collateral and judicial estoppel against Overwatch should fail.

Applicant Details

First Name	**Chaim**
Middle Initial	**T**
Last Name	**Mindick**
Citizenship Status	**U. S. Citizen**
Email Address	**ctm88@cornell.edu**
Address	**Address** Street **522 Hancock Ave #1-432** City **Corpus Christ** State/Territory **Texas** Zip **78401** Country **United States**
Contact Phone Number	**3392062200**

Applicant Education

BA/BS From	**University of Massachusetts-Boston**
Date of BA/BS	**December 2017**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 30, 2021**
Class Rank	**I am not ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Recommenders

Cornell, Angela
abc49@cornell.edu
607-255-7497
Schwab, Stewart
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607-255-3527
Yu, Xingzhong
xy64@cornell.edu
607-255-4975

This applicant has certified that all data entered in this profile and any application documents are true and correct.

522 Hancock Avenue #1-432

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2/9/2022

The Honorable John D. Bates

United States District Court for the District of Columbia

E. Barrett Prettyman United States Courthouse

333 Constitution Avenue, N.W., Room 4114

Washington, D.C. 20001

Dear Judge Bates:

I am writing to apply for the 2022-2023 Rules Law Clerk position in your chambers. I am a recent graduate of Cornell Law School, am currently serving as a judicial law clerk for Senior District District Judge Janis Graham Jack of the Southern District of Texas.

I am particularly interested in clerking for you, Judge, for several reasons. First, I am very interested in the unique nature of this clerkship position. As Judge Jack's sole law clerk, I have had the opportunity to grapple with many rules based-issues. In the past 6 months alone, I have encountered quite a few procedural questions that have stoked my interest in your work. Some examples include: 1) despite statutory silence, should a successive motion for compassionate release be permitted, 2) if the government does not file a timely response pursuant to a Court's order in a 2255 proceeding, should the Court consider its subsequent motion for summary judgment, and 3) does a statute of limitations begin to run after a court of appeals issues its judgment as mandate or when the court issues its dispositive judgment. All of these questions could easily be resolved in the thoughtful rule-making process. Second, like this position, my current clerkship is very unique. Judge Jack's docket consists primarily of post-conviction relief motions and the foster care class action litigation which is currently in its compliance phase. Therefore, I would hope that the opportunity to engage in ***some district court casework***, will fill in any gaps in my district court education, particularly with respect to civil litigation that is not in a compliance stage. Lastly, I am very interested in administrative law, and prior to accepting my clerkship I was slated to join Morrison & Foerster's FDA practice group. Clerking for you in D.C. will hopefully allow me to see agency litigation behind the scenes, while also positioning me to apply for either an honors program or a circuit clerkship to begin in 2023.

I have enclosed a resume, transcript, and writing sample. Letters of recommendation from Cornell Law School professors Schwab, Cornell, and Yu will follow. Should you require additional information, please let me know. Thank you for your time.

Sincerely,

Kai Mindick

Enclosures

Kai Mindick

ctm88@cornell.edu – 522 Hancock Ave #1-432, Corpus Christi, TX – (339) 206-2200

EDUCATION

Cornell Law School, Ithaca, NY
Juris Doctor, May 2021
Master of Laws in International and Comparative Law, May 2021
GPA: 3.56
Honors: CALI Award (highest grade):
Comparative Law-Civil Law Traditions (Fall 2019)
Advanced Issues in Mediation (Winter 2020)
Advanced Administrative Law-Food and Agriculture Regulation (Fall 2020)
Dean's List: Fall 2019
Concentration: Technology and Law
Won 2nd place in NYSBA Committee on Animals & the Law - Student Writing Competition for "Law and De-extinction: How the Current Legal Landscape Inadequately Considers the Revival of Extinct Species" – pending publication in Laws & Paws

Cornell Law School and Université de Paris I (Pantheon – Sorbonne), Paris, France
International and comparative law coursework, July 2019

University of Massachusetts Boston, Boston, MA
Bachelor of Arts in Sociology and Psychology, *summa cum laude*, December 2017
GPA: 3.93
Honors: Sociology Departmental Distinction
Honors Societies: Psi Chi and Alpha Kappa Delta
Dean's List: Spring 2016, Fall 2016, Spring 2017, Fall 2017

LEGAL EXPERIENCE

United States District Court for the Southern District of Texas, Corpus Christi, TX
Law Clerk for Judge Janis Graham Jack, September 2021- September 2022
Responsible for providing legal support to federal district judge, primarily through preparing draft legal opinions and performing legal research and analysis.

Institute of Museum and Library Services, Washington D.C.
Legal Extern, February-May 2021
Researched and wrote memorandum for the agency relating to the preservation of online video games, various funding opportunities for fighting mis/disinformation, potential legal issues surrounding maker spaces, copyright damages, termination of grants, agency's pro bono policy, and legislative history of the statutory definition of 'museum'. Compiled biographical dossiers of congresspersons and senators. Prepared legal training materials for agency employees, like the agency's social media policy and the Paperwork Reduction Act.

Morrison & Foerster LLP, Boston, MA
Summer Associate, June-July 2020
Analyzed FDA & EPA regulations for the marketability of anti-bacterial products. Researched

and drafted memoranda detailing anti-assignment, anti-kickback, and telemedicine-reimbursement regulations in health care as well as false claims act liability and attorney ethical obligations when a government contractor violates foreign law. Performed diligence and modified contract language in a university IP grant agreement and a finance deal. Summarized recent trends in FTC enforcement of manipulative algorithms in online marketplaces. Received post-graduation employment offer to join the FDA regulatory group.

Cornell Labor Law Clinic, Ithaca, NY
Legal Intern, September 2019-May 2020
Researched and drafted memoranda detailing just cause termination under a collective bargaining agreement that led to a favorable settlement. Prepared witnesses for direct and cross examinations. Drafted Duty of Vigilance law memorandum for an international union.

Cornell Farmworker Legal Assistance Clinic, Ithaca, NY
Legal Intern, May-June 2019
Drafted legal memorandum, motions, and affidavits. Formulated strategies to help farmworkers obtain special immigrant juvenile status. Coordinated translation sessions with interpreters.

RESEARCH and TEACHING EXPERIENCE

Lou Guard, General Counsel, Hobart and William Smith Colleges, Geneva, NY
Research Assistant, November 2020-present
Supported the author of a treatise that details recent legal developments in higher education by editing chapters for concision, providing citations, and locating source material.

Professor Stewart Schwab, Professor of Law, Cornell Law School, Ithaca, NY
Research Assistant, May 2019-present
Assisted the Reporter who is drafting a uniform noncompete law for the Uniform Law Commission. Researched and wrote survey of 50 states and territories noncompete laws. Drafted noncompete law policy report for the Uniform Law Commission.

Teaching Assistant for Tort Law Course, August-December 2020
Graded daily homework and essay assignments. Held office hours to help students understand substantive tort law. Provided technical assistance re: Zoom and Canvas programs.

Professor George Hay, Professor of Law and Economics, Cornell Law School, Ithaca, NY
Research Assistant, May-June 2019
Curated cases for the Economics and the Law syllabus. Edited cases in syllabus for concision.

Professor Heidi Levitt, Department of Psychology,
University of Massachusetts Boston, Boston, MA
Research Assistant, May-July 2017
Studied the effects of heterosexism on mental health.

PROFESSIONAL QUALIFICATIONS

Passed July 2021 New York Bar Exam (bar admission pending)

INTERESTS

Adventure travel, listening to audiobooks, dogs, pick-up basketball, and volunteering

Kai Mindick

ctm88@cornell.edu – 522 Hancock Ave #1-432, Corpus Christi, TX – (339) 206-2200

Professional References

Senior District Judge Janis Graham Jack
United States District Court for the Southern District of Texas
1133 North Shoreline Boulevard, Room 320
Corpus Christi, Texas 78401
(361) 443-2359
Janis_Graham_Jack@txs.uscourts.gov

General Counsel Nancy E. Weiss
Institute of Museum and Library Services
955 L'Enfant Plaza North, SW, Suite 4000
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Cornell Law School - Grade Report - 06/15/2021

Chaim T Mindick

JD-LLM, Class of 2021

Course	Title	Instructor(s)	Credits	Grade	
Fall 2018 (8/21/2018 - 12/17/2018)					
LAW 5001.2	Civil Procedure	Clermont	3.0	B+	
LAW 5021.4	Constitutional Law	Rana	4.0	B	
LAW 5041.2	Contracts	Thomas	4.0	B+	
LAW 5081.3	Lawyering	Freed	2.0	B	
LAW 5121.1	Property	Alexander	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.2700
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.2700

Spring 2019 (1/15/2019 - 5/14/2019)					
LAW 5001.3	Civil Procedure	Holden-Smith	3.0	B+	
LAW 5061.1	Criminal Law	Garvey	3.0	B+	
LAW 5081.3	Lawyering	Freed	2.0	B+	
LAW 5151.2	Torts	Schwab	3.0	A	
LAW 6101.1	Antitrust Law	Hay	3.0	B-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	14.0	14.0	3.3321
Cumulative	30.0	30.0	30.0	30.0	30.0	30.0	3.2990

Summer 2019 (7/2/2019 - 7/27/2019)					
LAW 6006.1	Business and Human Rights	Cornell	1.0	A	
LAW 6177.1	Comparative Legal Studies	Lasser	1.0	A	
LAW 6244.1	Comparative Corporate Governance	Whitehead	1.0	A	
LAW 6466.1	Gender and International Human Rights	Babcock	1.0	A	
LAW 6476.1	Globalizing Constitutional Law	Anker	1.0	A	
LAW 6521.101	International Business Regulations	Gardner	1.0	A+	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	6.0	6.0	6.0	6.0	6.0	6.0	4.0550
Cumulative	36.0	36.0	36.0	36.0	36.0	36.0	3.4250

Fall 2019 (8/27/2019 - 12/23/2019)					
LAW 6131.1	Business Organizations	Hockett	3.0	B+	
LAW 6161.1	Comparative Law: Civil Law Traditions	Lasser	3.0	A	CALI
LAW 6191.1	Conflict of Laws	Holden-Smith	3.0	S	
LAW 6321.1	Employee Benefits Law	Spencer	2.0	A	
LAW 6485.1	Function of the General Counsel	John	3.0	A	
LAW 7189.101	Current Issues in Collective Bargaining	Salvatore	1.0	A	
LAW 7599.101	New Rights, Cyberspace and Law	Yu	3.0	A-	
LAW 7871.301	Labor Law Clinic	Cornell	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	21.0	21.0	21.0	21.0	18.0	18.0	3.7783
Cumulative	57.0	57.0	57.0	57.0	54.0	54.0	3.5427

^ Dean's List

Winter 2020 (1/6/2020 - 1/13/2020)					
LAW 6019.1	Dispute Resolution Practicum	Scanza	4.0	A-	
LAW 6080.101	Advanced Issues in Mediation	Scanza	4.0	A	CALI

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	8.0	8.0	8.0	8.0	8.0	8.0	3.8350
Cumulative	65.0	65.0	65.0	65.0	62.0	62.0	3.5804

Spring 2020 (1/21/2020 - 5/8/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 6451.1	Federal Indian Law	Lazore-Thompson	3.0	SX	
LAW 6568.1	Internet Law, Security and Privacy	Grimmelmann	3.0	SX	
LAW 6625.1	Law and Society in North Korea	Hong	1.0	SX	
LAW 6643.1	Law of Robots	Walters	2.0	SX	
LAW 6743.1	Conflicts in Patent Law and Practice	Dabney	2.0	SX	
LAW 6766.1	Regulation of Food and Drugs	Whitehead	3.0	SX	
LAW 6890.1	Tax Treaties	Reinhold	3.0	SX	
LAW 6953.1	Trade Secrets Law and Practice	D'Amore	2.0	SX	
LAW 7805.301	Advanced Labor Law Clinic	Cornell	2.0	SX	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	21.0	21.0	21.0	21.0	0.0	0.0	N/A
Cumulative	86.0	86.0	86.0	86.0	62.0	62.0	3.5804

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 6011.1	Administrative Law	Stiglitz	3.0	B+	
LAW 6238.1	Advanced Administrative Law: Food and Agriculture Regulation	Jaffe	3.0	A	CALI
LAW 6821.1	Securities Regulation	Omarova	3.0	B+	
LAW 7232.101	Ethical Issues in Criminal Investigation, Prosecution & Policy	Bachrach	3.0	S	
LAW 7310.101	Intellectual Property and Health Technologies	Brougher	3.0	B+	
LAW 7589.101	Seminar in National Security Issues & Policy	Pepper	3.0	A-	
LAW 7696.101	Reclaiming the Public/Private Distinction	Dorfman	3.0	B-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	21.0	21.0	21.0	21.0	18.0	18.0	3.3883
Cumulative	107.0	107.0	107.0	107.0	80.0	80.0	3.5372

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6070.1	Federal Policy Making	Simonetta	1.0	SX	
LAW 6081.101	Animal Law	Sullivan	2.0	B+	
LAW 6465.1	Global MA Practice	Kihira	1.0	SX	
LAW 6791.1	Public International Law	Richardson	3.0	B+	
LAW 6883.1	Corporate Finance for Lawyers: Bootcamp	Eisen	1.0	A-	
LAW 7032.101	Comparative Property Law	Chang	3.0	A	
LAW 7123.101	Chinese Law: Tradition and Modernization	Yu	3.0	A	
LAW 7295.101	Global Labor and Employment Law	Sander	3.0	A-	
LAW 7834.301	Externship - Part Time	Azemi	4.0	SX	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	21.0	21.0	21.0	21.0	15.0	15.0	3.6886
Cumulative	128.0	128.0	128.0	128.0	95.0	95.0	3.5611

Total Hours Earned: 128

Received JD on 05/30/2021
Received LLM in Intl and Comparative Law on 05/30/2021

February 09, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: *Chaim Mindick Recommendation*

Dear Judge Bates:

I write to support the clerkship application of Chaim (Kai) Mindick, whom I have had the pleasure of working with during his studies at Cornell Law School. Kai has taken three of my courses and in each he has excelled, demonstrating strong analytical, research and writing skills. In addition to his excellent skill set, he is extremely hard working. His performance is particularly noteworthy because each semester he was carrying a very heavy course load as he was working on his JD and LLM in international and comparative law simultaneously.

In the fall of 2019, Kai was a student in the Labor Law Clinic, which I direct. This course provides students the opportunity to gain practical experience in the field of labor and employment law. In this context I work closely with the students, supervising their client representation. One of the primary cases that Kai worked on in the Clinic involved a Latino worker who was terminated from his job. There had been racial slurs made during his employment and allegations of discrimination, but the Clinic case involved a contractual issue of whether his termination was consistent with just cause pursuant to a collective bargaining agreement where final and binding arbitration was the dispute resolution mechanism. Kai did an excellent job sorting through the issues in a complicated case. Kai and the other two students on his team were at the forefront of the arbitration preparation, sorting through documents and other evidence to support their case, working on direct examinations, preparing for cross examinations and other work necessary for a two-day evidentiary hearing. There was also a statutory claim related to documents requested, and Kai helped to prepare the argument supporting the unfair labor practice charge with the National Labor Relations Board. He took his work seriously. Kai did a fine job at tackling numerous legal tasks and worked well with the client, witnesses and other students. Thanks to the diligence and hard work of Kai and the other students, the case settled favorably for his client without the need for a hearing.

The other significant project that Kai worked on in the Clinic involved research related to the French Due Diligence statute that requires French and foreign corporations of a certain size operating in France to ensure that their business conduct does not violate international human rights norms, including when they operate in other countries. It was an interesting international labor law project on an issue not widely covered at that point. This project also involved interviewing several witnesses. Kai took the lead on this case, immersed himself in the material and produced an excellent client memo on the topic. The client spoke very positively about Kai's work product and how much she enjoyed working him to advance the project.

In addition to the classroom component of the Clinic courses, he also was a student in my Business and Human Right course. In these classroom settings, Kai was consistently well prepared and engaged. He was intellectually curious and thoughtful. He often contributed insightful comments in class and participated actively in our discussions.

Lastly, I'll note that during the arbitration preparation, Kai's father was seriously ill. I offered to lighten his work load. But, he thought he could manage it, and he did so professionally.

It is without reservation that I recommend Kai Mindick for a clerkship in you chambers. He has the skill set, determination, and temperament to excel. Please do not hesitate to contact me if I can provide additional information.

Sincerely,

Angela B. Cornell
Clinical Professor of Law

Angela Cornell - abc49@cornell.edu - 607-255-7497

February 09, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I write to recommend Chaim (Kai) Mindick to be your law clerk. I am delighted to do so. I know Kai well and am confident he has the smarts, creativity, personality, and work ethic to be an excellent law clerk.

First, a bit about me. I have been teaching at Cornell Law School for 38 years--serving for ten years as Dean of the Law School. My primary teaching and scholarly areas include Torts, Employment Law, and Law and Economics, but over the years I have taught widely in the curriculum. I have seen many students and had many research assistants in that time. Before that I was a law clerk for the late Judge J. Dickson Phillips, Jr., of the U.S. Court of Appeals for the Fourth Circuit and for Justice Sandra Day O'Connor of the United States Supreme Court, so I know something about the tasks required of judicial clerks.

Now, on to Kai. Bar none, Kai has been my best research assistant ever. He is an exceptional student, imaginative and self-motivated with a monstrous work ethic. I first came to know Kai in his second semester in law school when he was in my Torts class. It was a class of about 70 students. He was the type of student who sits in the back, takes it all in, and gives the unusually perceptive comment that gets the entire class thinking. Kai did well in the class and got one of the handful of As. (By the way, we still grade on a mandatory curve, which limits grade inflation. B+ is a fine grade, A- is above average, and in most classes only about ten percent get A's).

In his first year Kai had a variety of grades as he was getting accustomed to the Socratic style. Things clicked for Kai in his first summer. In summer 2019, Kai attended Cornell Law's summer program at the Sorbonne, where he blossomed. Comparative and international issues are a particular strength of Kai's, and he basked in the Parisian setting and did spectacularly well, getting five A's and an A+. Kai returned to Ithaca in the fall and continued his streak, getting the top student award (the so-called CALI prize) in Comparative Law: Civil Law Traditions, and garnering A's elsewhere, and in the winter intersession another CALI prize in Advanced Issues in Mediation. Covid hit in spring 2020 and the school went to mandatory pass-fail that semester. In the fall Kai earned yet another CALI prize, this time in Advanced Administrative Law: Food and Agriculture Regulation. Kai achieved this record while taking 21 credits each upper-level semester, way above the typical 13-14 credits. Kai can juggle a lot of tasks.

But grades are not really the point for a student like Kai. I know him best as my research assistant (and later my teaching assistant for Torts), and it is here that I see up close his creativity, smarts, and work ethic combining into an incredible package. In summer 2019, Kai asked if he could be my research assistant while he was taking a full load of classes in Paris. Intrigued by his performance in Torts, I agreed, even though at that point I was unfamiliar with guiding research assistants remotely (my, how long ago those pre-Covid times seem today).

I was the Reporter for the Uniform Law Commission's Study Committee for a Covenant Not to Compete statute. As you undoubtedly know, the Uniform Law Commission is a unique interstate public body, with each state appointing two commissioners, usually by the governor. The ULC is tasked with drafting "Uniform Laws" that the commissioners then urge their states to adopt as law. In our case, the study committee was to decide whether the ULC should promulgate a uniform statute on employee noncompete agreements for all fifty states to adopt. My task was to write a report of what states were doing in this area, and Kai's task was to figure out what states were doing.

In this first summer observing Kai's work, I saw glimmers of brilliance. He was creative and he was diligent. Perhaps most importantly, he was a self-starter and worked well in Paris with minimal oversight and direction by me in Ithaca. I would say, however, that in this first summer Kai was not yet as fully disciplined or organized in his thinking as he has since become. Overall, his work product was hugely useful as I wrote my report to the study committee.

One thing the study-committee report lacked was input from various stakeholders. Without an understanding of how influential players might view a noncompete statute, the ULC executive committee would be reluctant to approve the project. What was I to do? Answer--turn to Kai and ask him first, to figure out who the relevant stakeholders were, and second, figure out what their positions on noncompetes were. Showing great ingenuity in research methods, Kai scoured the internet for position papers, testimony before state legislatures, and other statements about noncompetes from groups ranging from the Chamber of Commerce to employee rights organizations to the American Medical Association. I circulated Kai's memorandum on interest-group positions to the ULC commissioners and received many compliments on how thoughtful and helpful his memo was. Kai's research has already had a real-world impact.

The Uniform Law Commission assembled a drafting committee and appointed me as Reporter. I immediately turned to Kai again, and fortunately for me Kai found time among his many other obligations to continue the work. His task, initially working with two other students but for the last eight months alone, was to look in detail at various statutes, determine best practices, draft actual statutory language, and write commentary explaining and justifying the decisions made. Kai has been brilliant--while

Stewart Schwab - sjs15@cornell.edu - 607-255-3527

again juggling 21 credits, a fifty percent greater load than the average law student, and serving as a teaching assistant. He responds quickly and thoughtfully to all tasks I put in front of him.

Let me describe in a bit more detail what Kai has done in this research project, for I think the skills will transfer well to the tasks of a law clerk. Basically, Kai has examined and categorized the various approaches of 53 states (including D.C., Guam, and the Virgin Islands) towards the enforcement of agreements in which a worker promises not to work for a competitor after leaving the first employer. States are all over the map, literally and figuratively. California, North Dakota, and Oklahoma (not a typical troika) refuse to enforce noncompetes, while Florida and other states are sympathetic. Most jurisdictions fall somewhere in between. Some states have old statutes, some have recent legislation, while most rely on common-law court decisions. Detecting themes and coherent structures is the challenge for the researcher. And how Kai is up to the challenge! He appreciates similarities and distinctions on multiple dimensions, knows when cups are half full or half empty, and knows how to generalize without ignoring important detail.

More recently we have turned to the daunting task of drafting statutory language. Drafting statutes requires precision and accuracy unlike any other type of writing that I know of, and Kai is up to this challenge too. His input has been invaluable, ranging from whether a particular context requires an "a" or "the" to the intricacies of defining "work" and "worker" without completing falling down in circles, to the appropriate name of the act (current front runner: Uniform Restrictive Employment Agreement Act). In all this, Kai has gotten a birds-eye view of how a legislative drafter makes decisions knowing a judge is peering over the drafter's shoulder.

Kai's talents have been recognized by others within the Uniform Law Commission. The chair of the noncompete drafting committee told me he would name Kai an Assistant Reporter if he were not still a student. And Kai received special dispensation from the President of the ULC to attend the annual meeting in July 2021 in Madison, Wisconsin, despite the stringent covid protocols and Kai's unofficial status as "merely" my research assistant. No other research assistants are invited.

Kai will wear well as a law clerk. We have held weekly zoom meetings for almost a year, ranging in length from a crisp 45 minutes to several hours, and I always look forward to these work sessions. Kai takes the work seriously but not himself. He has an ironic sense of humor. Amazingly to me, in this past year he has taken hiking trips to Namibia, the Grand Canyon, and Yosemite and we have sometimes zoomed from these spots.

In conclusion, I hope I have conveyed my extreme enthusiasm for Kai Mindick's abilities as a potential law clerk. He writes clearly and quickly. He researches accurately. He can do prodigious amounts of work. He has the twin skills, so necessary in a law clerk as in my ULC project, of giving his own thoughtful, creative ideas while cheerfully accepting and skillfully implementing my approach once I have made a decision. I am confident Kai will be a credit to your chambers and to Cornell Law School. I urge you to interview him (and then hire him).

Sincerely,

Stewart J. Schwab
Jonathan & Ruby Zhu Professor
Cornell Law School

February 09, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: Kai Mindick-Applicant for judicial clerkship

Dear Judge Bates:

I am writing in support of Mr. Kai Mindick's application for a judicial clerkship with you. Kai took my classes on *New Rights, Cyberspace and Law* in the fall semester of 2019 and *Chinese Law: Tradition and Modernization* in the spring semester of 2021. Through these two semesters, Kai and I had extensive conversations about legal philosophy, the use of intelligent technologies in law, and China's constitutional and legal framework, especially about its internet law and cyber surveillance, through which I got to know his academic interest and talent quite well.

My impression is that Kai is an extremely hard-working student who is willing to explore new and challenging issues. He attended my classes attentively and asked questions intelligently---often demonstrating a solid grasp of the substance of the subject and his keen interest in the topic.

His final paper for my class on New Rights, Cyberspace and Law addressed techneurological manipulation and the need for regulation of this emerging technology. He was concerned with technologies that, upon use, negatively impact the consumer's cognition, and argued for the need to regulate the relationship between consumers and technology, especially under the US jurisdiction. His final paper for my class on Chinese law, *Discourses on Salt, Iron, and Technology: How a 2100-year-old debate on government monopoly predicted China's desire to control its technology industry*, takes up a bold task to address a 2000-year-old debate in imperial China and its relevance to our understanding of the current Chinese policy towards technology and its social and economic implications. Both papers were excellent pieces of academic work and stood out among a dozen of high-quality writing projects.

In general, Kai's papers have demonstrated that he is very well equipped with sophisticated research capabilities and excellent writing skills. His arguments proceed logically and coherently, and his writing style places significant emphasis on clarity, conciseness, and accuracy.

Based on the above, I think he is the right candidate for a judicial clerkship. I believe his capabilities and skills will be significantly enhanced under the guidance of a judge. Therefore, I recommend him strongly and enthusiastically for your favorable consideration.

Sincerely Yours,

Xingzhong Yu

Xingzhong Yu - xy64@cornell.edu - 607-255-4975

Kai Mindick

ctm88@cornell.edu • 6 Brevity Court, Binghamton, NY 13905• (339) 206-2200

Writing Sample

In this writing sample, I analyzed the national security implications of COVID-19, and why they justify a strong federal response. I wrote this paper for a seminar in National Security Issues & Policy at Cornell Law School during the late fall of 2020. I am the sole author of the work, and it has not been edited by others.

The paper was originally 27 pages long; I have redacted it in the interests of brevity. I eliminated five sections:

- The introduction which informed the reader of the current pandemic developments and framed the structure of the paper;
- Part I.2 which detailed COVID-19 responses around the world and the systems of governance, population, and geography that allowed for such varied measures;
- Part II which examined national security threat factors;
- Part IV which suggested several COVID-19 responses; and
- The conclusion which reinforced the recommended measures and the legal justifications for taking such action.

~~**Introduction**~~

Part I. The COVID-19 Response as of December 14, 2020

1. The U.S. Response

It is perhaps overlooked that in spite of the U.S.' poor response to the pandemic, the country has been in high alert since January 31, 2020, when President Trump declared a national public health emergency under the Public Health Service Act (PHSA).[1] Then, on March 13, 2020, President Trump declared a generalized national emergency under the National Emergencies Act (NEA) as well as the Stafford Act (SA).[2] The activation of these three acts availed the executive branch to a plethora of laws and incorporated powers that have been used in the following ways.

a. *Travel Restrictions*

Travel restrictions have been placed on both national and statewide levels. The former generally restricts the entry of non-U.S. citizens into the U.S. whereas the latter restricts the movement of U.S. citizens in the various states.

At the federal level, arguably three large travel orders have been issued. First, pursuant to the PHSA, the Center for Disease Control (CDC) issued an order on March 20, 2020 to prevent non-U.S. citizens and non-permanent residents from entering the U.S. from Mexico or Canada that is subject to review every 30 days by the director of the CDC and has been maintained as of October 13, 2020.[3] Similarly, the Department of Homeland Security (DHS) on March 24, 2020 issued a rule under 9 U.S. Code § 1318 to prevent travel of all persons from Canada and Mexico into the U.S., barring certain exceptions, and the rule has been extended to remain in place until

[1] Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. Mar 13, 2020. at https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/
[2] *Id.*
[3] 85 FR 65806 (Oct 13, 2020). at https://www.federalregister.gov/documents/2020/10/16/2020-22978/order-suspending-the-right-to-introduce-certain-persons-from-countries-where-a-quarantinable

December 21, 2021.[4] Finally, through presidential proclamation under Section 212(f) of the Immigration and Nationality Act (INA), the executive branch has suspended and set conditions upon, the entry of persons from certain countries into the United States (e.g. Brazil, China, Iran).[5]

As for the responses by individual states, they are drastically varied.[6] Thus, three various types of travel restrictions will be highlighted for illustrative purposes. California issued a mandatory stay at home order that went into effect on December 5, 2020 and remained in place for 3 weeks.[7] Hawaii issued a proclamation requiring that travelers must be tested for COVID-19, and received a negative test result, all within 72 hours of their departure.[8] Lastly, some states, like Connecticut, require individuals that arrive from states with high-prevalence COVID-19, self-isolate for 14 days upon arrival.[9]

b. *Industry Appropriation*

The executive has utilized the powers under the Defense Production Act (DPA) to require certain companies to accept and perform contracts for the production of medical supplies related to the COVID-19 outbreak.[10] On March 27, 2020, a presidential memorandum was issued that permitted the Secretary of Health and Human Services (HHS) to use any and all authority available

[4] 85 FR 74604 (Nov 23, 2020). at https://www.govinfo.gov/content/pkg/FR-2020-11-23/pdf/2020-25866.pdf
[5] Presidential Proclamations on Novel Coronavirus. Jun 29, 2020. at https://travel.state.gov/content/travel/en/News/visas-news/presidential-proclamation-coronavirus.html
[6] Megan Marples and Forrest Brown, *Covid-19 travel restrictions state by state*, CNN. Dec 14, 2020. at https://www.cnn.com/travel/article/us-state-travel-restrictions-covid-19/index.html
[7] California Department of Public Health. Regional Stay At Home Order. Dec 3, 2020. at https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf
[8] OFFICE OF THE GOVERNOR STATE OF HAWAI'I. SIXTEENTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY. at https://governor.hawaii.gov/wp-content/uploads/2020/11/2011098-ATG_Sixteenth-Proclamation-Related-to-the-COVID-19-Emergency-distribution-signed.pdf
[9] EXECUTIVE ORDER NO. 9I. PROTECTION OF PUBLIC HEALTH AND SAFETY DURING COVID-19 PANDEMIC – REVISIONS TO TRAVEL ADVISORY. at https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-9I.pdf
[10] 50 U.S.C. Chapter 55.

to acquire ventilators from the General Motors Company.[11] Similarly, on April 2, 2020, a presidential memorandum was issued that enabled the DHS to acquire as many N-95 respirators from the 3M Company as is necessary.[12] The DPA has been used incredibly well in some cases, like requiring manufacturers of COVID-19 test kits to prioritize the shipment of diagnostics to nursing homes.[13] Granted, in some cases its use has been questionable at best, like when the president issued an executive order requiring the continued production of meat during the height of the pandemic.[14]

c. *Vaccine Approval*

Fairly straight forward, the Food and Drug Administration (FDA), acting under the PHSA, has the ability to authorize a biologic for emergency use (EUA).[15] In October 2020, the FDA issued guidance for the criteria that must be met for such approval.[16] Then on December 11, 2020, "the FDA…determined that Pfizer-BioNTech COVID-19 Vaccine…met the statutory criteria for issuance of an EUA."[17] This use of emergency power made the vaccine available at a much earlier date than otherwise would have been permitted. This is exceptionally incredible when one considers that the vaccine was initially project to take 18 months to develop, and other vaccines,

[11] Memorandum on Order Under the Defense Production Act Regarding General Motors Company. Mar 27, 2020. at https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/

[12] Memorandum on Order Under the Defense Production Act Regarding 3M Company. Apr 2, 2020. at https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/

[13] ASH Press Office. Trump Administration Uses Defense Production Act to Aid Our Most Vulnerable. Aug 20, 2020. at https://www.hhs.gov/about/news/2020/08/20/trump-administration-uses-defense-production-act-to-aid-our-most-vulnerable.html

[14] Executive Order on Delegating Authority Under the DPA with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19. Apr 28, 2020. at https://www.whitehouse.gov/presidential-actions/executive-order-delegating-authority-dpa-respect-food-supply-chain-resources-national-emergency-caused-outbreak-covid-19/

[15] 21 U.S.C. § 360bbb-3.

[16] Emergency Use Authorization for Vaccines to Prevent COVID-19. Oct 2020. at https://www.fda.gov/media/142749/download

[17] FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine. Dec 11, 2020. at https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19

such as that for Varicella, took 28 years before final development.[18] This quick turnaround may be due to the multi-agency effort known as Operation Warp Speed, which was created to coordinate research funding and vaccine manufacturing by the various agencies in cooperation with industry.[19]

d. *Containment Measures*

As previously alluded to in the case of travel restrictions, some the forms of containment that actively place a limitation on a person's ability to move or affirmatively place an obligation on them fall under the purview of state and local governments (e.g. U.S. citizens mandatory quarantine). However, the federal government has exercised its ability to impose such duties on federal grounds. For example, the U.S. District Court of Alaska issued a mandate effective May 27, 2020 that requires persons to wear face masks.[20]

There are quite a few examples of how state and local governments have enacted measures to prevent the spread of COVID-19. States, like Alabama, have issued guidance for what measures businesses should take to safeguard against the pandemic. New York City has actually released a guidance document pertaining to how individuals should have sex during the pandemic.[21] Many states have also coopted the national guard to assist with food delivery, set up testing centers, and patient transportations.[22]

[18] Stuart A. Thompson, *How Long Will a Vaccine Really Take?,* N.Y. Times. Apr 30, 2020. at nytimes.com/interactive/2020/04/30/opinion/coronavirus-covid-vaccine.html
[19] Fact Sheet: Explaining Operation Warp Speed. at https://www.hhs.gov/coronavirus/explaining-operation-warp-speed/index.html
[20] MISCELLANEOUS GENERAL ORDER 20-18. D.Alaska. May 27, 2020. at https://www.akd.uscourts.gov/sites/akd/files/20-18_MGO_Face_Covering_COVID-19.pdf
[21] NYC Health. Safer Sex and COVID-19. Jun 8, 2020. at https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-sex-guidance.pdf
[22] Jim Reed, National Guard Assists Response to the COVID-19 Pandemic, Apr 28, 2020. at https://www.ncsl.org/research/military-and-veterans-affairs/national-guard-activation-in-every-state-assisting-response-to-the-covid-19-pandemic.aspx

On a final note, certain industries have chosen to self-regulate with respect to implementation of COVID-19 safeguards. The National Basketball Association released a 134-page document that outlines the proper procedures that teams, players, and staff must comply for the start of the new season.[23] Similarly, the National Football League released its own set of COVID-19 guidelines, which it has used throughout the 2020 football season.[24] However, not all business are behaving so responsibly. One example, out of many, includes a Scottsdale, Arizona gym that refused to close its doors in spite of local and state ordinances that mandates its closure.[25]

2. ~~Global COVID-19 Responses~~

   a. ~~*Taiwan*~~

   b. ~~*New Zealand*~~

   c. ~~*Iceland*~~

   d. ~~*Canada*~~

   e. ~~*Rwanda*~~

   f. ~~*Uruguay*~~

3. Understanding the Differing Responses

In comparing the U.S. response to the successful pandemic responses around the world, the following becomes apparent. First, the U.S. has a larger population and is not as isolated as some of the countries that successfully stopped the spread of the virus. Second, the U.S. did not respond as quickly or as strongly as other countries. Third, the U.S. did not institute incredibly invasive measures (e.g. Taiwan phone tracking), perhaps because they are in violation of

[23] Tim Bontemps, NBA outlines COVID-19 safety protocols in 134-page guide, ESPN. Nov 28, 2020. at https://www.espn.com/nba/story/_/id/30406725/nba-outlines-covid-19-safety-protocols-134-page-guide
[24] NFL COVID-19 PROTOCOLS. at https://operations.nfl.com/football-ops/nfl-covid-19-protocols/
[25] Ryan Randazzo, *'I will not close my business': Scottsdale gym owner balks at COVID-19 closure order from health officials*, Nov 27, 2020. at https://www.azcentral.com/story/money/business/consumers/2020/11/27/scottsdale-gym-refuses-close-after-state-order-violating-covid-19-rules/6441530002/

constitutional rights (i.e. right to privacy).[26] Fourth, unlike some other countries, the U.S. has a multi-governmental structure which divides powers between federal and local levels (e.g. the CDC released contact tracing guidance which then had to be implemented by the various states and localities[27]), and the country has a privatized healthcare system. Lastly, the some of these countries are more collaborative with respect to their social dynamic whereas the U.S., at least according to one author, is a "cult of selfishness."[28]

Thus, two questions arise. First, should the U.S. attempt to incorporate some of the strategies used by other countries into its pandemic response. The likely answer is yes, as the calculus is relatively straightforward. If by implementing these measures the pandemic can be contained, especially with a minimal loss to individual liberty and state autonomy (i.e. major losses will be discussed later), then they should indeed be incorporated. Thus, the second question is entered. For some of these measures that can be incorporated, but haven't been thus far, or for other measures not used by these countries, how can the U.S. offer a legal justification for its pending actions? The answer lies in the interest of protecting against the threat to national security.

~~**Part II. The Exigent Need to Protect National Security as Justification for Novel Action**~~

1. ~~Key Factors in Treating the Pandemic as a National Security Issue~~
    a. ~~*Economic Threat*~~
    b. ~~*The Leadership Dilemma*~~
    c. ~~*Military and Police Paralysis*~~
    d. ~~*Bioterrorism*~~

[26] Milo Hsieh. *Coronavirus: Under surveillance and confined at home in Taiwan*, BBC. Mar 24, 2020. at https://www.bbc.com/news/technology-52017993
[27] Contact Tracing Resources for Health Departments. Dec 11, 2020. https://www.cdc.gov/coronavirus/2019-ncov/php/open-america/contact-tracing-resources.html
[28] Paul Krugman, The Cult of Selfishness Is Killing America, N.Y.Times. Jul 27, 2020. at https://www.nytimes.com/2020/07/27/opinion/us-republicans-coronavirus.html

e. ~~*Global Reputation*~~

Part III. A Survey of Power Creating Laws (and their limitations) to Utilize in a Pandemic

1. Criminal Bioterrorism

Billionaire tech mogul Bill Gates was quoted saying that a testing system is not enough, but rather a comprehensive tracking system that permits the government to know where the virus is must be utilized.[29] This concern raises the much-maligned criticism of Taiwan's tracking protocol, in that some argue that it would constitute an impermissible invasion of privacy.[30] Yet, before diving into such implications, there is a question of whether there would be a legal foundation with which to operate such surveillance. Herein lies the purpose of the criminal bioterrorism classification, it is the key that unlocks the surveillance toolbox.

Simply put, "a biological agent is any…infection substance…capable of causing…death…"[31] Thus, COVID-19 meets the statutory definition of a biological agent. The importance of this classification cannot be understated. First, under 18 U.S.C § 175, it is an act of bioterrorism to knowingly transfer a biological agent. So, in the case of the person who has COVID-19 and spits on an individual or decides to go to the grocery store without wearing a mask, it is quite likely they can be held liable under this section. Furthermore, 18 U.S.C. § 175a enables military intervention to enforce the act, which arguably can be used to justify federal intervention with respect to mandating quarantine. Fitting COVID-19 into the definition of biological agent does more than this.

[29] Monica Nickelsburg, *Bill Gates calls out federal government for disorganized COVID-19 testing in Reddit AMA*, Mar 18, 2020. at https://www.geekwire.com/2020/bill-gates-calls-federal-government-disorganized-covid-19-testing-reddit-ama/
[30] Lisa Cornish, *Tracking COVID-19: What are the implications for privacy and human rights?,* May 15, 2020. at https://www.devex.com/news/tracking-covid-19-what-are-the-implications-for-privacy-and-human-rights-97101
[31] 18 U.S.C. § 178.

Under 18 U.S.C. § 2332a, which governs the use of weapons of mass destruction, § 2332a(c)(2)(C) defines a weapon of mass destruction as a biological agent. Furthermore, its use or threatened use would be prohibited under this section, for when targeted "against a person within the United States and…the offense affects interstate commerce…shall be imprisoned…"[32] Considering that under 18 U.S.C § 2331 the classification of domestic terrorism has been interpreted by DOJ to mean "conduct that violates federal or state criminal law and is dangerous to human life, it is likely that the spread of COVID-19 when framing it as a biological does indeed constitute terrorism.[33] Now, the surveillance component of this discussion becomes apparent.

To receive authorization for a wiretap, which could potentially be used to intercept and track a person's location, the relevant authorities must have evidence of certain activities.[34] One such activity, under 18 U.S.C. § 2516(1)(q) is criminal violation of 18 U.S.C. § 2332a. Similarly, a trap and trace device may be authorized under 18 U.S. C. § 3123 if it will be in furtherance of a general criminal investigation. The device may then be used to monitor the individual's location.

Importantly, actual terrorism is not necessary to meet the surveillance authorization requirements under the law, rather suspected terrorism is sufficient. DHS defines a suspected terrorist as "…an individual who is reasonably suspected to be engaging in, has engaged in, or intends to engage in conduct constituting, in preparation for, in aid of, or related to terrorism and/ or terrorist activities."[35] Therefore, if the ***potential*** for leaving quarantine to travel to a public place after being tested positive for COVID-19 can trigger a ***reasonable suspicion of infection***, then it may constitute an act of terrorism. Thus, when classifying COVID-19 as a biological agent and the potential for its ability to infect someone as a justification for reasonable

[32] 18 U.S.C. § 2332a(2)(D).
[33] Dispelling Some of the Major Myths about the USA PATRIOT Act. at https://www.justice.gov/archive/ll/subs/u_myths.htm
[34] 18 U.S.C. § 2516.
[35] MYTH/FACT: Known and Suspected Terrorists/Special Interest Aliens. Jan 7, 2019. at https://www.dhs.gov/news/2019/01/07/mythfact-known-and-suspected-terroristsspecial-interest-aliens

suspicion, many of the surveillance powers afforded to the federal government in dealing with terrorist activities become available.

At this point you may be cocking your head in confusion. You might ask, how can transferring COVID-19 be an act of terrorism? The answer lies in statutory interpretation. It does not even require an incredibly broad reading to fit COVID-19 into the definition of biological agent. Furthermore, if the executive were to indeed do this, they would potentially do so with deference from the court, as the courts generally defer to agency judgment in cases of national security. However, this process does raise issues concerning the seemingly eviscerated right to privacy. Further complicating this potential breach is the scrutiny in which surveillance has come upon in recent memory. It was not too long ago that the FBI was forced to revise its surveillance procedure under Section 702 of the Foreign Intelligence Surveillance Act (FISA).[36] Yet, at the end of the day, the generic test to determine whether privacy rights are violated is whether there is a "reasonable expectation of privacy."[37] If the individuals is told that they need to quarantine, and that they will be monitored, then they would not have a reasonable expectation to privacy. This is rather counter to the traditional use of wiretapping or tracing, for in the usual situation an individual is unaware of the government's efforts, whereas here, the COVID-19 positive individual would be fully aware of the governments interest in tracking their movement.

> "Congress has granted broad, flexible powers to federal health authorities who must use their judgment in attempting to protect the public against the spread of communicable disease."

[36] Elizabeth Goitein, *How the FBI Violated the Privacy Rights of Tens of Thousands of Americans*, Oct 22, 2019. at brennancenter.org/our-work/analysis-opinion/how-fbi-violated-privacy-rights-tens-thousands-americans
[37] *See* Katz v. United States, 389 U.S. 347 (1967).

The quote above is from federal district court judge, Charles Schwartz, in his explanation of the powers afforded to the executive under Section 361 of the PHSA.[38] Looking to the language of the statute, there are no real hamstringing limitations that Congress attached to its grant of power.[39] In fact, the language plainly reads "The Surgeon General…is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases…"[40] Thus, this beckons the question, can the federal government impose its seemingly plenary public health authority, perhaps in the form of a mandatory quarantine or vaccine usage, onto the 50 states?

It is only necessary to look into recent events to find an example of such a question. In July 2020, President Trump attempted to use police to engage with protestors.[41] This action was met with cries of unconstitutionality, as the police powers exercised traditionally fall under the purview of the states.[42] The idea of state policy power has long been recognized under the 10th amendment to the Constitution, as being owed to the states given that it was not expressly delegated to the federal government.[43] Yet, one must wonder if the broad grant of power in the case of communicable diseases does indeed constitute a delegation of authority from the states to the federal government. If so, then any measures taken by the government under the statute, even if they are considered to be police power, would be constitutionally valid in theory.

However, given the current national emergency, there are other ways to justify the use of what some may interpret as police power. The Insurrection Act of 1807 provides that "whenever the President considers that unlawful obstructions…or assemblages… against the authority of the

[38] *See* Louisiana v. Mathews, 427 F.Supp. 174, 175 (E.D.La.1977).
[39] 42 U.S.C. Part G.
[40] 42 U.S.C. § 264.
[41] Isaac Chotiner, *Trump's Dangerous Attempt to Create a Federal Police*, The New Yorker. Jul 26, 2020. at https://www.newyorker.com/news/q-and-a/trumps-dangerous-attempt-to-create-a-federal-police
[42] *Id.*
[43] Police Powers. at https://www.nolo.com/dictionary/police-powers-term.html

United States, make it impracticable to enforce the laws of the United States …he may call…the armed forces, as he considers necessary…"[44] Broadly read, it appears as though the police power granted through this statute may very well be utilized should the promulgation of laws related to the federal management of the pandemic, particular pertaining to interstate commerce and travel (i.e. so as to hook the commerce clause), be ignored by the states. Of course, to hook the commerce clause in such a way would beckon the opposition to cite the Rehnquist court cases that limited the use of the commerce clause for what was tantamount to appropriation of state police power.[45] But here, the impact on interstate commerce as previously discussed, should skirt any such concerns. In fact, one could argue that any COVID-19 related federal restrictions may be constitutional under the commerce clause alone, given the deleterious effect the virus has had on the economy.[46]

Another justification to the use of police power may be to classify those persons who blatantly disregard the dangerousness of the virus, and thus haphazardly spread the virus upon contamination, as belligerents. A Department of Defense (DOD) Directive from 2014 defined unprivileged belligerent as "an individual who is not entitled to the distinct privileges of combatant status (e.g., combatant immunity), but who by engaging in hostilities has incurred the corresponding liabilities of combatant status."[47] If persons test positive and then engages in behavior reasonably calculated to infect another person, it might trigger belligerency status. Additionally, the extra-constitutional power of the President with respect to declaring belligerent status and taking proper measures in a time of national emergencies finds support in the Prize

[44] 10 U.S.C. § 252.
[45] *See* United States v. Morrison, 529 U.S. 598 (2000); *See also* United States v. Alfonso D. Lopez, Jr., 514 U.S. 549 (1995).
[46] *See* United States v. Darby Lumber Co., 312 U.S. 100 (1941) (the Supreme Court noted that the "power of Congress over interstate commerce is not confined to the regulation of commerce among the states.")
[47] DoD Detainee Program. DoDD 2310.01E, Aug 19, 2014. at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf

Cases, where Abraham Lincoln declared certain characters as belligerents, so as to executive military power onto them without requiring a declaration of war to be approved by Congress.[48]

There is however a glaring weakness in this approach. Belligerency assumes some form of outright hostility, not just a reasonable expectation that individuals will appear hostile and as such, the classification of belligerent might only be triggered upon an individual actively engaging in certain conduct. However, if a law like this was used in tandem with the surveillance framework, then upon determining that a COVID-19 positive individual actually broke quarantine and thus, engaged in hostilities, they might be classifiable as a belligerent. Yet, this presupposes an authority to impose quarantine in the first place. Potentially, state the violation of state mandated quarantine could be one such source of power in addition to those others enumerated thus far.

Now that the issue of police power has been tentatively resolved, there comes perhaps the bigger question: what kinds of mandates would indeed be constitutional? Two Supreme Court cases speak directly to two potentially relevant response. First, the Supreme Court held, in a case where an individual challenged a state law that required involuntary quarantine of an infected person, that mandatory quarantine in the circumstance was a reasonable exercise of state power.[49] Then a few years later, the Supreme Court held that a state's compulsory vaccination law was indeed constitutional.[50] The court balanced individual liberty with the need to protect the public health by noting that for a public health regulation to avoid being arbitrary or oppressive, it must not go "beyond what [is] reasonably required for the safety of the public"[51] Thus, the law shows that an individual's liberty interests are not impermeable when it comes to the safeguarding of the public welfare. As such, a mandatory requirement for vaccinations, quarantine, or other measures

[48] *See* Prize Cases, 67 U.S. (2 Black) 635 (1863).
[49] *See* Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health, 186 U.S. 380 (1902).
[50] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[51] *Id.*

reasonable to prevent the spread of disease, should not implicate any first amendment issues. Granted, any such restrictions would still be subject to other constitutional limitations. After all, the Supreme Court recently enjoined New York from enforcing an order that imposed greater restrictions on gatherings at religious establishments relative to their secular counterparts.[52]

3. Influencing State Cooperation

Given the traditional allocation of police power to the states, the argument that the federal government may indeed exercise this power during a national emergency will indeed face opposition. While argument for such a quasi-police power provides a formal approach to mandating a federal pandemic response, there is yet the possibility for a functionalist approach. There are ways that the federal government may influence the states to adopt certain rules and regulations, which in this case, would be those relevant to the prevention of COVID-19.

One way to influence state police power is through the purse. This is especially pertinent to COVID-19, as Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which authorized the released of close to 2.2 trillion dollars in COVID-19 related relief.[53] If another stimulus is needed, Congress may choose to attach conditions to the disbursement of funds to the various states so long as "the funds are for the general welfare and the conditions imposed are unambiguous, related to a federal interest, and constitutionally permissible."[54] Of course, there remains a question of whether attaching a condition which it is required that the states enact certain mandatory COVID-19 polices would be a coercive and unconstitutional infringement of a state's police power.

[52] *See* Roman Catholic Diocese Of Brooklyn, New York V. Andrew M. Cuomo, Governor Of New York, 592 U.S. ____ (2020).
[53] H.R. 748, CARES Act, Public Law 116-136.
[54] *See* South Dakota v. Dole, 483 U.S. 203 (1987).

Another method of handling the funds would be to contain within a COVID-19 stimulus bill a provision which directs the President to distribute the monies to the states. In this way, the method of how the President chose to disburse the funds would be up to her interpretation and would likely receive deference as the President would be acting in a way that Congress authorized her to.[55] However, one might choose to articulate the clause requiring the President to direct where the funds are to be transmitted as a condition which would still be subject to the *Dole* requirements. In which case, it is possible that it would fail even with *Youngstown* deference.

Aside from using the purse to influence states, the executive may very well argue that the 14th amendment places an affirmative duty on the President to act on behalf of the interest in U.S. citizens to implement a federal response to the pandemic. The 14th amendment reads the following: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." One can argue that the first listed clause creates an obligation on behalf of the states not only to refuse to pass laws that abridge the privileges of citizens, but also, to choose the best and most scientifically informed law, as this is a privilege of the citizenry. The second clause may then be read as placing a requirement on states to not just require due process of law in certain scenarios, but also to pass laws that would prevent the loss of life and liberty when the state is the only actor that might be able to afford such protection. The President may then argue that under this reading, unless certain laws are passed, that the states are in violation of the constitution and the presidential oath to "preserve, protect, and defend the Constitution of the United States" creates an obligation by the president on behalf of the people to impose a federal response should the states refuse to comply with proper COVID-19 response standards. As for who determines whether

[55] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

standards are proper, that is arguably a job for the executive as well, given its propensity for hoarding expertise. If nothing else, one may look to Section 5 of the 14th amendment which states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article" as a justification for attaching conditions to funds or promulgating legislation the usurps the police power of the states with respect to the management of COVID-19.

Lastly and briefly, the FDA, CDC, and HHS house some of the most brilliant and respected minds in the U.S. Dr. Anthony Fauci alone has garnered applause around the world for his steadfast attitude towards convincing the Trump administration to deal with the pandemic from a scientific perspective.[56] If none of the other suggested measures are indeed able to justify a federal response to the pandemic, perhaps the focus should shift towards utilizing this expertise to convince states to adopt similar measures, or even, to petition the Uniform Law Commission to draft a law that may be adopted individually by all 50 states.

PART IV. U.S. Governmental Pandemic Response: Suggestions for the Future

1. ~~A Unified Response~~
2. ~~Tracking COVID-19 Positive Persons~~
3. Mandatory Quarantine

To some, the thought of a federally mandated quarantine might bring to memory the disgraceful history with regards to the U.S. holding that Japanese internment camps were constitutional.[57] However, as recently evinced by the Supreme Court, COVID-19 orders that are based on discrimination will not be tolerated and as previously discussed, the court previously held

[56] Davey Alba and Sheera Frankel, *Medical Expert Who Corrects Trump Is Now a Target of the Far Right*, N.Y.Times. Mar 28, 2020. at https://www.nytimes.com/2020/03/28/technology/coronavirus-fauci-trump-conspiracy-target.html

[57] *See* Korematsu v. United States, 323 U.S. 214 (1944).

that mandatory quarantine was indeed constitutional. Thus, given that the quarantining of infected persons is vital to preventing COVID-19 outbreaks, such a measure must be taken.[58]

4. Compulsory Vaccination

Many individuals argue that a compulsory vaccination mandate would violate first amendment religious freedom rights, or an individual's right to bodily autonomy, but the Supreme Court has clearly spoken on this matter.[59] In *Prince v. Massachusetts*, the supreme court justified a state use of police power by citing the previously noted *Jacobson* ruling and noting that requiring a vaccination is a legitimate use of police power.[60] Thus, given that the opposition to such a requirement has grounding in the law that is tenuous at best, and that mandatory vaccination is the most efficacious way to stop the spread of the virus, it should be effectuated.[61]

5. Requiring Masks, Sanitizer, and Social Distancing
6. ~~Travel Restrictions~~
7. ~~Producing Medical Equipment~~

~~**Conclusion**~~

[58] Chapter 10: Controlling the spread of infectious diseases. Advancing the right to health: the vital role of law. at https://www.who.int/healthsystems/topics/health-law/chapter10.pdf
[59] Cole H. *Mandatory Vaccinations Violate our Rights*, Dec 20, 2019. at https://thepointpress.org/3638/opinion/mandatory-vaccines-violation-of-rights/
[60] *See* Prince v. Massachusetts, 321 U.S. 158 (1944).
[61] Lauren S. Grossman, *To put Covid-19 behind us, all Americans should be vaccinated against it,* May 12 ,2020. at statnews.com/2020/05/12/covid-19-vaccine-all-americans-should-get-it/

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March 5th, 2022

Honorable Judge John D. Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates,

I am a recent graduate of the University of Chicago Law School writing to express my interest in a 2022–23 clerkship in your chambers. I currently serve as a law clerk to Justice John D. Couriel on the Florida Supreme Court. I would appreciate the opportunity to build upon this practice by clerking for an experienced judge at the District of Columbia.

My training at the appellate level will allow me to immediately contribute to the important work of your chambers. As a law clerk for the Florida Supreme Court, I regularly analyze and evaluate the Florida Rules of Court Procedure. Recently, that included a comprehensive review of the rules' structure and operation for the sake of incorporating remote-participation procedures.

Beyond my clerkship, my legal coursework and independent research projects have prepared me for the responsibilities of this clerkship. During law school, I studied the canons of construction and the difficulties of language, including the difficulty of communicating rules between committees and their constituents. I also learned to extract meaning from the history and structure of simple, ancient text. As a result, I have provided more competent, more efficient assistance to Justice Couriel's chambers on cases involving the application of statutory, constitutional, or contract language. I am confident those experiences will help me be equally effective in assisting you with Standing Committee work.

For my independent research project, I wrote a tailored history of the FCC, which informed my discussion about its authority to conduct the 2020 electromagnetic spectrum auction. I also co-authored a historical piece on death penalty doctrine. I explained whether and how courts across the country have applied landmark capital sentencing decisions retroactively. Both writing projects became material to experiment with in my Editing and Advocacy class, where I further refined my editing and drafting skills.

My resume, writing sample, and transcripts are uploaded. Letters of recommendation from Justice John D. Couriel, Professor Brian Leiter, and Professor Jonathan Masur will arrive separately. If there is any other information that would be helpful to you, please let me know. Thank you for your time and consideration.

Sincerely,
Nathan Molina

Nathan M. Molina

850 S. Gadsden St., Unit 322, Tallahassee, FL 32301
(786) 376-1324 | nathanmmolina@comcast.net

EDUCATION

The University of Chicago Law School, Chicago, Illinois
J.D., with Honors, June 2021
Activities: Dean's Advisory Council, Intramural Soccer
Writing: "Managing Spectrum During the Emergence of 5G Technology," supervised by Professor Joan Neal
"*Ring* and *Hurst*: Deconstructing Divergent Doctrines," co-authored with Melanie Kalmanson

Florida State University College of Law, Tallahassee, Florida
Candidate for J.D., August 2018 – July 2019
Honors: Top 5%, Dean's List, Book Award in Tort Law and in Criminal Law
Activities: Oxford Law Program, Intramural Soccer

Florida State University, Tallahassee, Florida
B.A. in Political Science, May 2017
Activities: Student Body President and University Trustee, Resident Assistant, Orientation Leader, Law Clerk

EXPERIENCE

Justice John D. Couriel, Florida Supreme Court, Tallahassee, Florida
Judicial Clerk, August 2021 – Present

- Research, analyze, and draft decisions regarding direct and post-conviction relief, capital sentence appeals, civil appeals, and petitions involving issues of statewide significance
- Draft majority, concurring, and dissenting opinions on substantive and procedural questions
- Prepare chambers for oral arguments with summaries and bench memoranda

Federal Communications Commission, **International Bureau, Satellite Division**, Remote
Legal Intern, June 2020 – July 2020

- Evaluated spectrum-license applications for conformity with statutory and regulatory requirements
- Drafted spectrum management rules using stakeholders' proposals, public commentary, and agency history

Criminal and Juvenile Justice Clinic, University of Chicago Law School, Chicago, Illinois
Student Advocate, January 2020 – May 2020

- Interviewed clients and witnesses, investigated facts, prepared memoranda, and debated strategies for trial
- Drafted motions for document release, bond reduction, and release from custody

For All Moonkind, Remote
Legal Intern, March 2019 – August 2019

- Coordinated a research project on lunar mission data to develop a public registry of lunar spacecraft
- Studied international agreements on spacecraft registration to set the parameters for the public registry
- Communicated a technical presentation to the United Nations Committee on the Peaceful Uses of Outer Space Legal Subcommittee, calling for a multilateral agreement on heritage preservation in space

SpaceTec Partners SPRL, Brussels, Belgium
Analyst, April 2018 – August 2018

- Co-authored an industry survey on start-up financing to inform the European Investment Bank's investment in space technology companies
- Researched agriculture, fishing, shipping, and environmental industries to report the downstream benefits of a government-funded satellite program

INTERESTS

- Community soccer and kickball leagues, women's soccer, human activity in space

THE UNIVERSITY OF CHICAGO

Name: Nathan M Molina
Student ID: 12251854

University of Chicago Law School

Degrees Awarded

Degree: Doctor of Law
Confer Date: 06/09/2021
Degree GPA: 179.578
Degree Honors: With Honors
J.D. in Law

Academic Program History

Program: Law School
Start Quarter: Autumn 2019
Current Status: Completed Program
J.D. in Law

External Education

Florida State University
Tallahassee, Florida
Bachelor of Science 2017

CREDIT AWARDED FOR ACADEMIC WORK DONE AT FLORIDA STATE UNIVERSITY COLLEGE OF LAW, 2018-2019 38

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	42301	Business Organizations Anthony Casey	3	3	177
LAWS	44121	Introductory Income Taxation Julie Roin	3	3	180
LAWS	50311	U.S. Supreme Court: Theory and Practice Sarah Konsky Michael Scodro	3	3	179
LAWS	53271	Intensive Contract Drafting Workshop Emily Underwood Joan Neal	3	3	180
LAWS	92000	Greenberg Seminars: Groups Saul Levmore Julie Roin	1	1	P

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Brian Leiter	3	3	179
LAWS	51602	Legal Interpretation Req Designation: Meets Writing Project Requirement Frank Easterbrook	3	3	177
LAWS	53192	Entrepreneurship and the Law Amy Hermalik Elizabeth Kregor	3	3	182
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	180
LAWS	92000	Greenberg Seminars: Groups Saul Levmore Julie Roin	0	0	P

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	43244	Patent Law Jonathan Masur	3	3	EP
LAWS	47411	Jurisprudence I: Theories of Law and Adjudication Brian Leiter	3	3	EP
LAWS	53377	Big Problems Anup Malani David A Weisbach	3	3	EP
LAWS	53436	Law and the American Revolution Farah Peterson	1	1	EP
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	EP

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	43280	Competitive Strategy Eric Budish	3	3	177
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	179
LAWS	53455	Hacking for Defense Thomas Gossin-Wilson M. Todd Henderson	3	3	178
LAWS	68711	Workshop: Legal Scholarship Lisa Bernstein	3	3	180
LAWS	92000	Greenberg Seminars: Law and Politics in the Irish Literary Renaissance Martha C Nussbaum William Birdthistle	0	0	P
LAWS	93499	Independent Research: Managing the Electromagnetic Spectrum During the Emergence of 5G Technology Req Designation: Meets Substantial Research Paper Requirement Joan Neal	2	2	183

Date Issued: 01/23/2022

THE UNIVERSITY OF CHICAGO

Name: Nathan M Molina
Student ID: 12251854

University of Chicago Law School

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	42801	Antitrust Law Eric Posner	3	3	179
LAWS	43218	Public Choice Saul Levmore	3	3	181
LAWS	43231	Introduction to Law and Economics Dhammika Dharmapala	3	3	182
LAWS	50602	Game Theory And The Law Douglas Baird	3	3	179
LAWS	92000	Greenberg Seminars: Law and Politics in the Irish Literary Renaissance Martha C Nussbaum William Birdthistle	1	1	P

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	46101	Administrative Law Ryan Doerfler	3	3	179
LAWS	53137	Roman Law Richard A Epstein	3	3	179
LAWS	53497	Editing and Advocacy Patrick Barry	2	2	P
LAWS	81123	Negotiation Jesse Ruiz	3	3	183
LAWS	92000	Greenberg Seminars: Law and Politics in the Irish Literary Renaissance Martha C Nussbaum William Birdthistle	0	0	P

End of University of Chicago Law School

Florida State University
Office of the Registrar
282 Champions Way
PO Box 3062480
Tallahassee, Florida 32306-2480

Name: **Nathan Michael Molina**
Student ID: 200028899
Birthdate: 03/28/1995
Residency: Florida Resident (USA)
Print Date: 8/23/2019

Unofficial Transcript

ALL CREDIT HOURS ON THIS RECORD REFLECTED IN SEMESTER HOURS
May not be released to a third party without permission

Beginning of Law Record

2018 Fall

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW5300	CIVIL PROCEDURE	A-	LWG		4.000	4.000	15.000
LAW5400	PROPERTY	A-	LWG		4.000	4.000	15.000
LAW5700	TORTS	A+	LWG		4.000	4.000	17.000
LAW5792	LEGAL WRTNG & RSCH I	B+	LWG		2.000	2.000	6.500

			Taken	Passed	GPA Hrs	Points
Term GPA	3.821	Term Totals	14.000	14.000	14.000	53.500
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.821	Comb Totals	14.000	14.000	14.000	53.500
Cum GPA	3.821	Cum Totals	14.000	14.000	14.000	53.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.821	Comb Totals	14.000	14.000	14.000	53.500

Term Honor: DEAN'S LIST

2019 Spring

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW5000	CONTRACTS	A	LWG		4.000	4.000	16.000
LAW5100	CRIMINAL LAW	A	LWG		3.000	3.000	12.000
LAW5501	CONSTITUTIONAL LAW I	B+	LWG		3.000	3.000	9.750
LAW5522	LEGISLATION AND REGULATION	A	LWG		3.000	3.000	12.000
LAW5793	LEGAL WRITNG/RECH II	A	LWG		3.000	3.000	12.000

			Taken	Passed	GPA Hrs	Points
Term GPA	3.859	Term Totals	16.000	16.000	16.000	61.750
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.859	Comb Totals	16.000	16.000	16.000	61.750
Cum GPA	3.842	Cum Totals	30.000	30.000	30.000	115.250
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.842	Comb Totals	30.000	30.000	30.000	115.250

Term Honor: DEAN'S LIST

2019 Summer

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW7930	SPECIAL TOPICS	A	LWG		2.000	2.000	8.000

Topic: COMPARATIVE CONTRACT LAW

			Taken	Passed	GPA Hrs	Points
Term GPA	4.000	Term Totals	2.000	2.000	2.000	8.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	4.000	Comb Totals	2.000	2.000	2.000	8.000
Cum GPA	3.852	Cum Totals	32.000	32.000	32.000	123.250
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.852	Comb Totals	32.000	32.000	32.000	123.250

Law Career Totals

			Taken	Passed	GPA Hrs	Points
Cum GPA:	3.852	Cum Totals	32.000	32.000	32.000	123.250
Trans Cum GPA		Trans Totals	0.000	0.000	0.000	0.000
Comb Cum GPA	3.852	Comb Totals	32.000	32.000	32.000	123.250

End of Law

End of Academic Transcript

Beginning of Service Transcript

Community Service Hours For 2015 Spring			
Issue	**Agency**	**Service Task**	**Hours**
Health Services	Childrens Miracle Network	Event Planning	70
		Service Hours for 2015 Spring	**70**
		Cumulative Service Hours	**70**

Community Service Hours For 2014 Fall			
Issue	**Agency**	**Service Task**	**Hours**
Health Services	Childrens Miracle Network	Service Planning	75
		Service Hours for 2014 Fall	**75**
		Cumulative Service Hours	**145**

Community Service Hours For 2014 Spring			
Issue	**Agency**	**Service Task**	**Hours**
Children/Youth	Boys and Girls	Child Care	4

Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1927

JOHN D. COURIEL
JUSTICE

PHONE NUMBER: (850) 922-5624

March 7, 2022

The Honorable John D. Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: Mr. Nathan Molina

Dear Judge Bates: (How much fun is this!)

I write in support of my law clerk Mr. Nathan Molina, who I understand has applied for a clerkship in your chambers when his work with me is done. Nathan is reliable and conscientious, a joy to have as a colleague. He also has a track record of leadership, having served as the student body president and a University Trustee at Florida State University. His future is bright indeed.

Nathan is, first and foremost, squared away. He is unfailingly the first of my law clerks to arrive in the morning. Self-motivated and organized, he approaches his written work with a plan, and has an appropriate sense for when, and about what, to check with me. He prepares orderly and well-researched bench memoranda. In his clear thought and writing, he has been a genuine aid to me in some of our hardest cases this term.

Nathan's co-clerks seek and value his input on their assignments. He listens. He is a willing and jovial reader of other people's work, able to provide comments without too much sting, and with the right amount of conviction about his own conclusions.

In our daily chambers conferences, he asks informed questions and is always prepared to discuss his cases. He has a healthy degree of self-awareness and is better able to anticipate counterarguments than many of his contemporaries. When the arguments and counterarguments are done, he is the first among his colleagues to organize an outing to a weeknight basketball or soccer game in Tallahassee, for which he is something of an ambassador.

Perhaps what shines brightest about Nathan is his sense of wonder and optimism for the future. Ask him, for example, about the U.S. Space Force and its effect on international space cooperation, or about the legal regimes that ought to govern lunar spacecraft and colonization, and you are likely to emerge a bit more hopeful about the rest of this century—or at least about Nathan's generation's place in making it livable. He is genuinely and deeply curious, and what's more, he has the organizational and executive skills needed to see his curiosity through to real learning.

Please be in touch if you would like to discuss Nathan. I am glad I hired him, and think you would be, too.

Every good wish,

How goes the business of republic-saving?! Please come visit us before it gets too late (and hot) in the year. We'd love to see you.

Yours always,

John

Professor Jonathan Masur
John P. Wilson Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jmasur@uchicago.edu | 773-702-5188

March 30, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I write to offer a strong recommendation of Nathan Molina for a judicial clerkship. Nathan is a bright and diligent student, the sort of person who demands the best work from himself and does not fail to deliver. Even in a short period at the law school he has been a very impressive student, and I am confident he has great things in front of him. In the more immediate term, he will be a superb judicial clerk.

I know Nathan principally through his work in my course on Patent Law during Spring Quarter of 2020. I had never met him when the quarter began, and so at first he was just a face in the crowd. But when I called on him in class, his performance was spectacular. He seemed to be able to grasp the most difficult concepts immediately, and he demonstrated that he had been diligently studying and learning the material on his own to prepare for class. Nathan quickly became one of the few students I could count on to answer the most difficult patent questions, typically questions that had already vexed one or more of the other students in the class. He understood patent issues at both doctrinal and policy levels, and he was able to move fluidly between the two in a way that few students can match. His answers and discussion were consistently thoughtful and creative, the product of a brilliant and active mind, not to mention a diligent work ethic. Patent Law involves a complex federal statute and a significant number of recent Supreme Court cases. Nathan showed such aptitude for parsing this type of material that I am confident he will absolutely thrive in a federal judicial chambers.

Nathan finished the quarter by writing a strong exam. His exam was particularly notable for the astute way in which he solved a very tricky question of novelty under 35 U.S.C. § 102(b). Again, Nathan demonstrated his prowess with federal statutes and his ability to parse even the most complex legal materials. We went to pass-fail grading that quarter, so I regret that I was not able to award Nathan the high A that he would easily have earned on the basis of his exam and participation in class. But I want to emphasize the fact that his ability to accomplish all of this and to perform so well, despite the fact that the class was ungraded and being taught over Zoom, is immensely impressive. Many students would have thrown in the towel when faced with these types of circumstances, but Nathan most certainly did not. He proved that he is internally motivated: he wants to learn and perform at the highest level regardless of whether he is being graded. This is the type of attitude that will serve him incredibly well throughout his life, and particularly in a workplace such as a judicial chambers.

Of course, my experiences with Nathan were hardly idiosyncratic. He graduated with Honors, an accolade that still means a great deal at a school that fights hard against grade inflation. He is currently clerking for Justice John Couriel of the Florida Supreme Court, and my understanding is that he has been doing excellent work. He would arrive at a second clerkship with a wealth of talent and ability, ready to perform at a high level from the first moment.

Finally, I had the pleasure of getting to know Nathan throughout the quarter I taught him, and I was consistently impressed by his thoughtfulness and maturity. He is a true adult, as well as a calm presence even under moments of stress. I was not surprised that he was selected for the Dean's Advisory Council, a group of students who—as the name suggests—advise the dean of the law school on important matters affecting the student body. Nathan leads by example, and other students cannot help but be impressed by his considerate nature and the ego-free way in which he presents himself and his ideas. I am confident that he will be very well-liked by his co-clerks and by everyone else in chambers.

Nathan Molina is a superb student, a diligent and dedicated thinker, and a mature and thoughtful person. I have no doubt that he will succeed admirably as a law clerk, and I recommend him strongly and without reservation.

Sincerely,

Jonathan Masur
John P. Wilson Professor of Law

Professor Brian Leiter
Karl N. Llewellyn Professor of Jurisprudence
Director, Center for Law, Philosophy and Human Values
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
bleiter@uchicago.edu | 773-702-0953

March 08, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am pleased to write in strong support of Nathan Molina, who has applied for a clerkship in your chambers.

Mr. Molina was a student in my Winter 2020 class on "Evidence" at the University of Chicago Law School. He received a grade of 179 on the three-hour multiple choice exam which, on our rather complicated grading scheme, is solidly above our median (which is 177) and just shy of an A-range grade (180 starts the A range). The highest grade in the class was 184, and Mr. Molina's score put him in roughly the top quarter of the class. (His overall record since transferring here also put him in roughly the top quarter of the class, and he graduated with honors.)

More notable than his exam performance, however, was his class participation: Mr. Molina was one of the two best students out of 26 in the Evidence class. (The other outstanding participant in discussion in that class subsequently accepted a federal district court clerkship.) Anytime he was "on call," his answers were articulate, crisp, and right on point. Even when not on call, he could be counted on to answer a question when everyone else was perplexed. It was an A+ in-class performance.

In Spring 2020, Mr. Molina also took my introductory class on Jurisprudence. The Jurisprudence class covers a range of issues in and around the theory of adjudication, the theory of how judges do decide cases and how they ought to decide them. The readings are drawn from O.W. Holmes, Karl Llewellyn, H.L.A. Hart, Ronald Dworkin, John Finnis, and Joseph Raz, among other important jurisprudential writers; the emphasis throughout is on detailed, critical analysis of the arguments advanced. The eight-hour take-home essay exam in Jurisprudence tests the student's understanding of the positions and arguments. Because our Spring quarter coincided with the pandemic, the class was conducted entirely on-line, and all exams were graded on a mandatory pass/fail basis. Some students plainly did not put full effort into the exam, but Mr. Molina did: it was well-written and knowledgeable, and if it had been graded on our usual curve it would have probably gotten a 180 (A-). Once again, he was also an active participant in class discussion, despite the "remote" format. I also enjoyed a virtual "happy hour" during the term with Mr. Molina and several other students, which confirmed my impression of him from Evidence as a very likable person, who gets along well with his peers.

Mr. Molina has, in one respect, unusually well-formed interests: he is very interested in outer space, and the legal regulation of the use and development of space. He may want to pursue this through government service, or in the private sector, and perhaps, down the line, in an academic context. He wants to clerk to hone his oral and written communication skills and his legal analytical abilities. On the evidence of his jurisprudence exam, his work in Evidence, and his contributions in class, I am confident Mr. Molina will be a successful clerk, as well as a congenial presence in your chambers.

Sincerely yours,

Brian Leiter
Karl N. Llewellyn Professor of Jurisprudence
Director, Center for Law, Philosophy, & Human Values

WRITING SAMPLE

The following excerpt is from a bench memo I prepared as an appellate clerk. I have changed the names to anonymize the parties involved.

ANALYSIS

Smith's disclosure of his smartphone passcode would be "testimonial" and thereby protected under the Fifth Amendment. Additionally, the State's argument, that Smith's disclosure is a foregone conclusion, is insufficient to deny Smith his Fifth Amendment privilege. Despite those conclusions, which weigh in Smith's favor, it is not settled law that Smith may invoke the Fifth Amendment at the stage of proceedings presented for our review. In light of that uncertain legal foundation, it is appropriate to end this Court's inquiry with the conclusion that certiorari review is unavailable and leave determination of the Fifth Amendment question for another case.

A. The Privilege Against Self-Incrimination Is Inapplicable at This Stage of the Proceedings

[Omitted.]

B. If the Fifth Amendment Covers this Stage of Proceedings, the Court Should Conclude that Disclosure Is Testimonial

Smith's disclosure of the passcode would be testimonial under the Fifth Amendment because disclosure would "relate a factual assertion or disclose information." *Doe II*, 487 U.S. at 210. By disclosing the passcode, Smith would imply that he owns the phone and was at the scene of the crime. Further, Smith's disclosure would be testimonial because it requires him to communicate the contents of his mind.

The U.S. Supreme Court has held that the Fifth Amendment privilege against self-incrimination protects one "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber*, 384 U.S. at 761. To invoke the Fifth Amendment, a defendant must show that the evidence is (1) incriminating, (2) compelled, and (3) testimonial. *Hubbell*, 530 U.S. at 34–38.

Accordingly, whether the Fifth Amendment applies depends, in part, on whether disclosing the passcode would be "testimonial." "In order to be 'testimonial,' an accused's oral or written communication, or act, must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe II*, 487 U.S. at 210. A communication is also testimonial if the defendant is compelled, through that communication, to express the contents of his mind. *Id.* at 210 n.9 ("We do not disagree with the dissent that '[t]he expression of the contents of an individual's mind' is testimonial communication for purposes of the Fifth Amendment.").

The State argues that Smith's disclosure would not be testimonial because it would not be testimony, but an administrative grant of access to the phone. Smith responds that his disclosure would be testimonial because it requires him to create a new statement using the contents of his mind.

Smith is correct. Disclosure of the passcode would be testimonial because it would "relate a factual assertion or disclose information." *Id.* at 210. Since police found the smartphone in question near the crime scene, disclosure would reveal

Smith's possession of the phone and presence at the crime. Smith's disclosure would also require him to communicate the digits he has mentally stored as those which unlock his phone. In other words, he would have to express the contents of his mind, which makes the communication testimonial under *Doe II*. *Id.* at 210 n.9.

Other state supreme courts, in answering whether disclosure of a passcode is privileged under the Fifth Amendment, have also concluded that disclosure is testimonial. *See Andrews*, 234 A.3d at 1273 (finding disclosure of a passcode testimonial because it required facts contained within the holder's mind—analogous to a combination to a safe rather than the key to a chest); *Pittman*, 479 P.3d at 1043 (holding that disclosure of the defendant's passcode would be testimonial because it would communicate the defendant's knowledge of the passcode); *Eunjoo Seo*, 148 N.E.3d at 952 (holding that giving law enforcement an unlocked smartphone is testimonial because it communicates the suspect's knowledge of the password, the existence of the files on the device, and the suspect's possession of those files); *Commonwealth v. Davis*, 220 A.3d 534, 548 (Penn. 2019) (holding that revealing a computer password is testimonial because it demands the defendant recall the contents of his mind, and because it carries implied incriminating factual assertions).

The State's argument that it does not seek testimony, only access, carries no weight. Although it is true Smith's disclosure of the passcode would grant the State access to the phone, access is not the only thing gained from disclosure. The State would also gain an implied concession that Smith owns the phone and was present at

the crime. In other words, Smith would be handing the State incriminating evidence through his own testimony.

C. Smith's Disclosure is Not a Foregone Conclusion

Smith's disclosure of the passcode is not a foregone conclusion because the State has not established the information that disclosure would communicate, such as Smith's possession of the phone and presence at the crime.

The foregone conclusion "exception," or "doctrine," is derived from *Fisher*, 425 U.S. at 411. In *Fisher*, the Court declined to apply self-incrimination protections to a defendant who was ordered to execute consent forms granting the government access to potentially incriminating tax documents. *Id.* at 410. The Court justified its holding by suggesting that the potentially incriminating information was a foregone conclusion: the State knew the information whether the defendant provided it or not. *Id.* at 411 ("The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers."). Thus, if this Court finds that *Fisher*'s reasoning is applicable to this case, then the trial court may compel Smith to disclose the passcode.

The State argues that in deciding whether disclosure is a foregone conclusion, the Court should only ask whether the State knows the facts that disclosure of the passcode would communicate: (1) the passcode exists, (2) Smith controls or possesses it, and (3) the passcode is authentic. On the contrary, the Fourth District in

G.A.Q.L., and the First District in *Varn* and *Pollard* asked whether the State knew not only the potential facts, but also the contents it sought from the phone.

The State is correct: whether disclosure is a foregone conclusion depends on whether the State knows the facts that disclosure will communicate. The trial court would be compelling only the passcode, not the contents of the phone. Since Smith would not being compelled to produce the contents of the phone, the Fifth Amendment does not apply to production of the phone's contents and the foregone conclusion question is irrelevant to them. *See* *Stahl*, 206 So. 3d at 136 (asking whether the State "has established that it knows . . . that the passcode exists, is within the accused's possession or control, and is authentic"); *Apple MacPro Comput.*, 851 F.3d at 248 n.7 ("[A] very sound argument can be made that the foregone conclusion doctrine properly focuses on whether the government already knows the testimony that is implicit in the act of production."); *Johnson*, 576 S.W.3d at 227 ("The focus of the foregone conclusion exception is the extent of the State's knowledge of the existence of the facts conveyed through the compelled act of production."); *Pollard*, 287 So. 3d at 657 (Winokur, J., dissenting); *Varn*, 45 Fla. L. Weekly D2079 at *4 (Winokur, J., concurring).

Although the foregone conclusion question does not include whether the State knows the contents of Smith's phone, it does require more knowledge than the State lets on. In addition to the passcode's existence, Smith's control or possession of it, and the passcode's authenticity, disclosure would also communicate Smith's presence

at the crime. Police found the phone four-to-five feet from the shattered window. If Smith admits possession of the passcode, he implies he was present at the crime.

Thus, the Court may consider Smith's disclosure a foregone conclusion only if the State can show that it already knows the passcode exists, that Smith controls or possesses it, that the passcode is authentic, and that Smith was present at the crime. The State has shown it knows the passcode exists, for it cannot access the phone without the passcode. The State has shown the passcode is self-authenticating; it reveals itself as authentic only by unlocking the phone.

The State, however, has not shown that it knows Smith possesses or controls the passcode, nor that Smith was present at the crime. Without the State's demonstration of such facts, the Court cannot conclude that Smith's disclosure of his passcode is a foregone conclusion exempt from Fifth Amendment protection.

Applicant Details

First Name	**Leah**
Last Name	**Motzkin**
Citizenship Status	**U. S. Citizen**
Email Address	**lsm459@nyu.edu**
Address	**Address** Street **2216 11th St NW, Unit 2** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**6025152173**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2016**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Alston, Philip
philip.alston@nyu.edu
212-998-6173
Barkow, Rachel
barkowr@mercury.law.nyu.edu
212-992-8829
Miller, Arthur
arthur.r.miller@nyu.edu
212-992-8147

References

Sally Katzen, Professor of Practice and Distinguished Scholar in Residence and Co-Director of the Legislative and Regulatory Process Clinic at NYU School of Law, katzendyk@gmail.com, (202) 486-0473?;

Kwasi Mitchell, Chief Purpose Officer at Deloitte Consulting LLP, kwmitchell@deloitte.com, (703) 945-7951;

Michael Williams, Senior Staff Attorney at The Door - A Center for Alternatives, Inc., michael@door.org, (347) 464-8265.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

LEAH MOTZKIN
2216 11th St NW #2, Washington, DC 20001 · (602) 515-2173 · lsm459@nyu.edu

February 14, 2022

The Honorable John Bates
United States District Court, District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, D.C., 20001

Dear Judge Bates:

My name is Leah Motzkin, and I am a 3L at the New York University School of Law. I am writing to apply for a clerkship in your chambers for the 2022–2023 term.

With experience in both the public and private sectors, I understand how to work effectively in collaborative and fast-paced environments. I developed and honed my skills in legal research, analysis, and writing as a research assistant for Professor Arthur Miller, as a summer associate at Arnold & Porter in Washington, D.C., and in my legal internship in the Office of Associate Attorney General. I would be honored to clerk in your chambers.

Please find my resume, my law school transcript, my undergraduate transcript, and two writing samples enclosed. As I recently submitted an amicus brief to the Inter-American Court of Human Rights with Professor Philip Alston, I am sharing a draft version of the brief that reflects my individual work in addition to my standard writing sample. The following individuals are submitting letters of recommendation separately and welcome inquiries:

Prof. Arthur Miller
University Professor and Warren E. Burger Professor of Constitutional Law and the Courts, NYU School of Law
arthur.r.miller@nyu.edu
917-797-4634

Prof. Rachel Barkow
Vice Dean and Segal Family Professor of Regulatory Law and Policy, and the Faculty Director of the Center on the Administration of Criminal Law, NYU School of Law
rachel.barkow@nyu.edu
917-903-5679

Prof. Philip Alston
John Norton Pomeroy Professor of Law, NYU School of Law, and Special Rapporteur on extreme poverty and human rights, UN Human Rights Council
philip.alston@nyu.edu
212-998-6173

If there is any other information that would be helpful to you, please let me know. I can be contacted at the details provided above. Thank you in advance for your time and consideration.

Respectfully,

/s/ Leah Motzkin

LEAH MOTZKIN

2216 11th St NW #2, Washington, D.C. 20001 · (602) 515-2173 · lsm459@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York
Candidate for J.D., May 2022
Honors: *Review of Law and Social Change*, Digital Articles Editor
Activities: Professor Rachel E. Barkow (Criminal Law); Teaching Assistant; Immigrant Rights Project, Co-Chair; ACLU Criminal Law Reform Project, Clinical Extern

YALE UNIVERSITY, New Haven, Connecticut
B.A. in American Studies, May 2016
Honors: Distinction in the major
Activities: Students and Alumni of Yale Association, President

EXPERIENCE

DEPARTMENT OF JUSTICE, OFFICE OF THE ASSOCIATE ATTORNEY GENERAL, Washington, D.C.
Legal Intern, NYU Legislative and Regulatory Process Clinic, August 2021 – Present

ARNOLD & PORTER, Washington, District of Columbia
Summer Associate, May 2021 – Present
Research and draft legal memos to assist the public policy practice and with litigation, including a pro bono appellate matter.

PROFESSOR ARTHUR R. MILLER, NYU SCHOOL OF LAW, New York, New York
Research Assistant, May 2020 – January 2021
Updated Volumes 13E (Diversity Jurisdiction) and 9 (Jury Trial) of Wright & Miller's "Federal Practice & Procedure," including finalizing a new edition of Volume 9.

THE DOOR - A CENTER OF ALTERNATIVES, INC., New York, New York
Immigrant Youth Removal Defense Intern, May 2020 – August 2020
Represented young people applying for Special Immigrant Juvenile Status. Assisted clients with accessing benefits during the unprecedented global pandemic.

U.S. DEPARTMENT OF STATE FULBRIGHT FELLOWSHIP, Mérida, Mexico
Fulbright Scholar, August 2018 – May 2019 (represented the U.S. as a university English teacher)

DELOITTE CONSULTING, Washington, D.C.
Strategy & Operations Business Analyst, Federal Practice, January 2017 – August 2018
Developed and implemented strategies for government agencies and international donor organizations to improve mission effectiveness. Implemented a series of practice-wide inclusion initiatives.

DEMOCRATIC PARTY OF VIRGINIA, Rosslyn, Virginia
Leadership Assistant and Political Associate, Coordinated Campaign, August 2016 – November 2016
Facilitated communications between the state team and headquarters and managed relationships with state elected official. Managed teams of employees and volunteers at events and rallies.

FOREIGN LANGUAGE, PUBLIC SERVICE, & INTERESTS

- Proficient in Spanish.
- Served as Subcommittee Coordinator for Biden for President Policy Committee.
- Submitted amicus brief to the Inter-American Court of Human Rights with Professor Philip Alston and the Center for Reproductive Rights advocating for the decriminalization of abortion in El Salvador.
- Secured parole for client after he served twenty-seven years in state prison.
- Worked on an Emmy-nominated documentary for HBO; create and sell handmade beaded purses.

Name: Leah S Motzkin
Print Date: 02/14/2022
Student ID: N16352760
Institution ID: 002785
Page: 1 of 1

New York University
Beginning of School of Law Record

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Stratos N Pahis			
Torts	LAW-LW 11275	4.0	B
Instructor: Robert L Rabin			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Borders and Walls			
Instructor: Mitchell A Kane			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Property	LAW-LW 10427	4.0	CR
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Stratos N Pahis			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Sally Katzen Dyk			
Criminal Law	LAW-LW 11147	4.0	CR
Instructor: Rachel E Barkow			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Borders and Walls			
Instructor: Mitchell A Kane			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Racial Justice Clinic	LAW-LW 10012	3.0	A
Instructor: Claudia Angelos Jason D Williamson			
Corporations	LAW-LW 10644	4.0	A-
Instructor: Robert Jackson			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Rachel E Barkow			
Racial Justice Clinic Seminar	LAW-LW 11764	3.0	A-
Instructor: Claudia Angelos Jason D Williamson			
Strategic Human Rights Litigation Seminar	LAW-LW 12531	2.0	A-
Instructor: Philip G Alston James Andrew Goldston			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff Arthur R Miller			
Administrative Process Seminar	LAW-LW 10470	2.0	A-
Instructor: Robert A Katzmann			
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Melissa E Murray			
Advanced Racial Justice Clinic	LAW-LW 12758	2.0	A
Instructor: Claudia Angelos			
Advanced Racial Justice Clinic Seminar	LAW-LW 12759	1.0	A
Instructor: Claudia Angelos			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Legislative and Regulatory Process Clinic	LAW-LW 12230	8.0	A
Instructor: Sally Katzen Dyk Robert Bauer			
Legislative and Regulatory Process Clinic Seminar	LAW-LW 12231	6.0	IP
Instructor: Sally Katzen Dyk Robert Bauer			

	AHRS	EHRS
Current	14.0	8.0
Cumulative	71.0	65.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Evidence	LAW-LW 11607	4.0	***
Instructor: Daniel J Capra			
Review of Law & Social Change	LAW-LW 11928	2.0	***
Digital Currency, Blockchains and the Future of Financial Services	LAW-LW 12371	3.0	***
Instructor: David L Yermack			
Role of the Lawyer in Public Life	LAW-LW 12397	2.0	***
Instructor: Robert Bauer			
Human Rights at Home: Advancing U.S. Social Justice Seminar	LAW-LW 12786	2.0	***
Instructor: Risa Elaine Kaufman			

	AHRS	EHRS
Current	13.0	0.0
Cumulative	84.0	65.0

Staff Editor - Review of Law & Social Change 2020-2021

End of School of Law Record

February 14, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am writing in support of the application by Leah Motzkin for a judicial clerkship. Before coming to NYU, Leah had already achieved an extremely impressive record while at Yale University and subsequently in various jobs, including teaching English at a high-level in Mexico, working for Deloitte and for Fox News. She has also made the most of her time at NYU in a way that few students manage to achieve. She has been a Research Assistant for my colleagues Prof. Rachel Barkow and Prof. Arthur Miller, she was co-chair of the Immigrant Rights Project, and was involved in a range of other demanding activities. She is clearly able to juggle a great many tasks while achieving excellent grades and making the most of all the opportunities available to her.

My most direct involvement came as a result of her enrolment in the seminar on Strategic Human Rights Litigation that I co-teach with James Goldston. He is the Executive Director of the Open Society Justice Initiative, which is probably the world's largest public interest group working on strategic litigation to promote respect for international human rights standards. Students are required to select a paper topic that relates in some way to the issues dealt with in the seminar, and Leah indicated at the outset that she would be interested in working on a current case, ideally with the ACLU or a similar group. After some time exploring the options, it became clear that those groups have their own staff and some very experienced volunteers and are not in need of student assistance.

I then proposed that she might work on preparing an amicus brief that I had been asked to submit on behalf of the Center for Reproductive Rights to the Inter-American Court of Human Rights. She accepted the task with alacrity and, after some conversations about the main lines of argument and consultation with lawyers from the CRR, Leah drafted a full amicus. I subsequently rewrote much of it to reflect my own particular expertise and to place some different emphases on key points and the amicus was duly submitted to, and accepted by, the court.

Leah's draft was excellent. She demonstrated very strong research and legal writing skills and was able to produce an analysis which went to the heart of the challenging issues before the court. She strictly observed the relevant deadlines that we were given, was very good at seeking inputs from the external lawyers, and at crafting a very compelling set of arguments.

Based on this intensive experience, I have no hesitation in concluding that Leah would make a superb law clerk and I am happy to recommend her in very strong terms.

Sincerely,

Philip Alston

Philip Alston - philip.alston@nyu.edu - 212-998-6173

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 310-F
New York, New York 10012-1099
Telephone: (212) 992-8829
Fax: (212) 995-4881
Email: rachel.barkow@nyu.edu

Rachel E. Barkow
Vice Dean and Charles Seligson Professor of Law
Faculty Director, Center on the Administration of Criminal Law

June 1, 2021

Dear Judge:

I am writing to recommend Leah Motzkin for a clerkship. Leah was a 1L in my criminal law class, and as a 2L she served as a teaching assistant for the criminal law class I taught this past fall. Leah's performance in both contexts was exemplary. I am confident she will be an outstanding law clerk.

Leah stood out immediately as one of the stars in her criminal law class. I could always count on Leah to know the answer to questions that stumped others and to offer interesting and intelligent insights on every issue we discussed. When we shifted to remote learning midway through the semester, she maintained that same high level of performance. Although we were not permitted to give traditional grades on exams during the semester, I can relay that Leah's performance on the test was so outstanding that I asked her to be a teaching assistant for the course. Leah is a natural lawyer, able to see all sides of an issue and persuasively argue based on any fact pattern.

Leah is also one of the most engaging and likable students I have had the pleasure of teaching. I asked her to be a teaching assistant not only because she is brilliant and could easily help the 1Ls understand the material, but also because Leah is kind and empathetic and gets along with everyone. As expected, the students gravitated to Leah and appreciated all the guidance she gave them in the course. She managed to forge connections even in the virtual space we still occupied in the fall.

Leah is an active member of the NYU community, serving in leadership positions with the Immigrant Rights Project and the *Review of Law and Social Change*. She has also served as a research assistant for Arthur Miller on his civil procedure treatise and as an assistant for Sally Katzen doing policy work for the Biden campaign. Leah's activities reflect her commitments. She is deeply committed to making the world a better place and she has all the skills to do it, whether the task at hand is an amicus brief, a policy memo, or editing the

work of others. Although she has not done writing assignments for me, I have read some of her written work, including her exam, and she is a clear and effective writer even under time pressure. I could always count on Leah as a student and a teaching assistant to be prepared, thoughtful, and supportive of others. And she is pure joy to be around – always enthusiastic to take on whatever comes next.

I know you would love working with Leah, as would everyone else in your Chambers. She is as nice as she is smart, and she gives everything 100% effort. If you have any questions, please do not hesitate to contact me.

Sincerely,

Rachel E. Barkow

Dear Judge:

I am writing on behalf of Leah Motzkin, who is applying for a position as your clerk following her graduation from the New York University School of Law in the Spring of 2022. Based on Ms. Motzkin's excellent first year class performance, I invited her to be one of my full time research assistants for the summer following her first year. Unfortunately the pandemic prevented me from having a face-to-face relationship with Leah. All of our interactions, which were many, had to be done over zoom or by email.

As a research assistant Ms. Motzkin edited and updated various aspects of the annual supplementation of the multivolume Wright and Miller Federal Practice and Procedure Treatise, focusing on identifying and developing material for Volume 9 on Federal Rules of Civil Procedue 38-41 on jury trial and dismissal as well as on diversity of citizenship. In addition she updated and edited the subject matter jurisdiction and venue chapter for a new edition of my Civil Procedure hornbook. Finally she assisted Professor Hershkoff and myself in preparing background data for an article on the effect of Covid-19 on American Courts that has been published in Germany and a second and far more detailed article on that subject is about to be published in this country. In the course of these projects, Ms. Motzkin did a considerable amount of research and writing on the subjects assigned to her, much of which required the exercise of writing ability, legal analysis, and judgment on her part.

Leah's research and writing were extensive and uniformly excellent. Her work product was complete and sound, indicating a very good command of research techniques and organizational skills. She dealt with some aspects of federal civil procedure and subject matter jurisdiction which were quite complex and worked on several topics that were outside the courses she took as a first year student and difficult for someone with only one year of law school experience. She writes clearly and logically with an excellent sense of structure and idea sequence. Beyond that, she is a very hard worker.

Leah is extremely bright, thoughtful, analytically sound, and takes instruction and direction well. She also takes her work seriously and is constantly aware of the value of professional improvement – she wants to learn and develop her legal skills. Ms. Motzkin is very helpful person by nature. She volunteered to assist other researchers get things done so that we could meet publishing deadlines for the supplementation of the treatise and the revision of the hornbook. Leah's work always was done in timely fashion, with attention to detail, and she understood fully the professional character of her legal work – people would use and depend on the quality and integrity of her work. She is curious about issues, both legal and non-legal. I consider Leah to have been a very reliable and dedicated research assistant, and I rank her highly among the summer researchers I have had in each of my almost sixty years of law teaching and employing multiple students every summer.

Ms. Motzkin has a solid commitment to the law as a profession and a strong desire to succeed and make a contribution as a lawyer. I have no doubt about her seriousness in terms of long-term career development. I am certain she will do well with her law firm experience at Arnold and Porter in Washington, D.C. this summer following her second year of law school. Leah is a likable, good-natured individual. I thoroughly enjoy her company, even if it has been mostly virtual. She

is mature, broad gauged in her outlook, has many fields of interest, and is very thoughtful about the future of the legal profession and the world around her.

On the basis of my experience with her, Leah should fit in extremely well in the collegial environment of a judge's chambers. She worked effectively and bonded with the other researchers the summer she spent with me and is a live wire who is well-liked by her classmates. The same should be true with regard to working with you and your other clerks and staff. I recommend her to you with confidence that he can perform whatever tasks you ask of her.

If I can be of any further assistance to you with regard to Leah, please do not hesitate to communicate with me.

Sincerely,

Arthur R. Miller

LEAH MOTZKIN
2216 11th St NW #2, Washington, DC 20001 · (602) 515-2173 · lsm459@nyu.edu

WRITING SAMPLE

Enclosed is a memorandum that I wrote as a part of a fictional academic writing exercise in October 2019 for my legal writing course—the Lawyering Program, taught by NYU Law Professor Stratos Pahis. I participated in a "client interview," performed by an actor, in which two other students and I conducted the "fact development." During this interview, we collected relevant supporting documents. Here, I omit those documents, but summarize all relevant information. I researched the case law and wrote the memorandum alone.

PRIVILEGED & CONFIDENTIAL
ATTORNEY WORK PRODUCT

TO: Stratos Pahis
FROM: Leah Motzkin
DATE: October 29, 2019
RE: **Casey Bolder: Research Memo**

This memorandum analyzes whether Est1883 Properties, LLC ("Est1883") employee Anya Simo, whom our client Casey Bolder is seeking to terminate, could bring a successful sex discrimination or mixed-motive discrimination claim based on Bolder's previous decision to hire an external candidate over promoting Simo or his impending decision to discharge her.

Though unlikely given the facts we obtained from Bolder, Simo may be successful in either claim. Est1883 is potentially vulnerable to a mixed-motive sex discrimination claim, which has a limited recovery.

Facts[1]

Est1883 is a family-run business that manages several properties in New York and Connecticut. The company has twenty-eight employees, only five of whom are in New York. Est1883 is run in what Mr. Bolder calls an "informal manner:" the company has no human resources department and no formal procedures for disciplining employees. Simo is one of two female employees and the only mother.

Simo is currently an assistant superintendent at Est1883's Bushwick location. She has worked for Est1883 since 2012 and, until his recent retirement, was supervised by Clarence Muller, who held the role of superintendent ("super"). Simo has two children and took maternity leave in 2014 and 2016.

[1] All facts come from a 45-minute interview conducted with Casey Bolder by Leah Motzkin and two other students on October 10, 2019, and a transcript of an interview with Clarence Muller.

To fill the vacancy left by Muller's retirement, Bolder hired Jonathan Moreland on a recommendation from a friend and because of his expertise in mechanical systems. Moreland is divorced and has joint custody of his children. Moreland's salary is $41,000—only slightly above Simo's $39,000. Bolder claims he no longer needs an assistant super at the Bushwick location, as he now has a younger super in the role.

Bolder shared that he wants to fire Simo because she is not responsive to his or tenants' phone calls, is frequently up to an hour late to work, fails to properly enforce building rules that have led to the company receiving citations from the city, and does not respond to repairs in a timely manner. Allegedly due to Simo's lack of oversight, the building received several citations for incorrect recycling sorting.

Muller shared an impression of Simo's work that does not fully comport with Bolder's claims. Muller said that she gets along well with tenants and local tradesmen and seems dedicated to the job. Muller likewise suggested that some of the citations that Bolder mentioned were received while Simo was on maternity leave. While Bolder specifically mentioned that Moreland's knowledge of mechanical systems differentiated him as the better candidate for the super role, Muller said that Simo has a decent working knowledge of the building and the mechanical systems, including basic plumbing, carpentry, and electrical skills.

Two months ago, after Simo late to respond to an incident at the Bushwick location because of a family matter, Bolder said to her, "you really need to work on that work-life balance." Bolder also admitted that he has made jokes to Muller about Simo attempting to be "super mom." It is unclear if Simo is aware of these comments.

Bolder shared that he did not speak to Simo about her being promoted to super. Muller, however, did speak with Simo about what he believed would be her forthcoming promotion in

the summer of 2019. He invited her to the super's apartment and discussed where her children could live. Bolder has never directly addressed his dissatisfaction with her performance with Simo, and Muller indicated that he did not pass on any feedback from Bolder or his concerns to Simo.

Analysis

Overview of the Law

An employment discrimination claim under Title VII of the Civil Rights Act of 1964 fails if the plaintiff cannot establish a *prima facie* case and the defendant can produce non-pretextual evidence of non-discriminatory reasons for the decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). A mixed-motives claim fails if the plaintiff cannot establish by a preponderance of evidence that the employee's membership of a protected class was a motivating factor for the employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

In order to make out a *prima facie* case of employment discrimination claim under Title VII, the plaintiff must establish "(1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her duties performed by a comparably qualified person." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 53 (1st Cir. 2000). *See also Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012). See also *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008).

If a plaintiff makes out a *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision, such as unsatisfactory performance or role redundancy. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 at 802. *See*

also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). "The employer's burden is merely a burden of production; the employee maintains the burden of proof throughout." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (quoting *Hicks*, 509 U.S. at 507.).

If the employer is able to produce evidence of a non-discriminatory reason for the employment decision, it falls on the employee to "present sufficient evidence" to show that the articulated reason is a pretext and "that the true reason is discriminatory." *Id*. at 54 (internal citations omitted).

To prevail in a mixed-motive claim, a plaintiff does not need to provide direct evidence of discrimination but needs to "present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)). Courts apply the *Price Waterhouse v. Hopkins* framework. 490 U.S. 228 at 258. "If the plaintiff establishes that a prohibited discriminatory factor played a 'motivating part' in a challenged employment decision, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision anyway." *Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997) (articulating the *Price Waterhouse* framework).

Damages

The damages that are available in a successful employment discrimination case are much more expansive than under a mixed-motive case. For an employment discrimination claim, damages are capped at $50,000, but may also include injunctions, affirmative action, equitable relief, accrual of back pay, reduction of back pay, and limitations on judicial orders. 42 USCS §

2000e-5(b), 42 U.S.C. § 2000e-5(g)(1). In a mixed-motive claim, the court may grant declaratory relief, injunctive relief, and attorney's fees, but will not award damages or issue an order requiring reinstatement of the employee. 42 U.S.C. § 2000e-5(g)(2)(B).

Potential Liability Under the Law

Though it is unlikely based solely on the information we have from our client, if additional facts come to light, Simo may be able to make out a *prima facie* case for discrimination based on either her lack of promotion or upcoming termination. While she is a member of a protected class (women) and suffered or will suffer an adverse employment action, under the facts as we know them, she will struggle to satisfy the second prong of the case as outlined under *Santiago-Ramos*—that she performed her job satisfactorily. 217 F.3d 46 at 53. Bolder found Simo's performance to be unsatisfactory as she was often late, unresponsive to his and tenants' calls, and allegedly careless with her recycling and maintenance responsibilities. Yet the plaintiff's task of proving the case is "minimal" and "not onerous." *Carlton v. Mystic Transp., Inc.*, 202 F.2d 129, 134 (2d Cir. 2000); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 at 253. Simo may point to the fact that she never received negative feedback about her performance or to Bolder's failure to fire her or discipline her over her tenure as inconsistent with the claim that she was performing unsatisfactorily. *See Chambers v. TRM Copy Centers Corp*, 43 F.3d 29, 39 (2d Cir. 1994) (defendant's failure to discharge the plaintiff during a time when he was allegedly performing poorly was inconsistent with the claim of poor performance).

If Simo is able to establish a *prima facie* case, the burden shifts to Bolder to "articulate a legitimate, non-discriminatory reason for the adverse employment action." *Holleman v. Art Crating Inc*, 2014 U.S. Dist. LEXIS 139916, 72 (2014). In responding to a claim for termination,

Bolder can focus on her role's redundancy, as Est 1883 is seeking to eliminate the role of assistant super altogether. *See James v. New York Racing Ass'n*, 233 F.3d 149, 160 (2000) (employer not held liable when eliminating a role deemed unnecessary). If facing a failure to promote claim, Bolder will have to produce evidence that substantiates his claim of her unsatisfactory performance. *Santiago-Ramos*, 217 F.3d at 54. Any citations that the building received while under her care—and not while she was on maternity leave—will be helpful here.

Even if Bolder's presumption of unlawful discrimination is rebutted, Simo may proffer evidence that suggests her gender is a motivating factor for the employment decisions, known as a mixed-motives claim. "The plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors" *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 123 (2d Cir. 2004).

To substantiate a mixed-motives claim, Simo may raise the comments that Bolder made about her work-life balance. If she learns about the "super mom" remark even after her termination, the court may allow it into evidence because, regardless of prior knowledge, "the statute does not bar an employee from using prior acts as background evidence in support of a timely claim." *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002). Simo might also highlight the perceived promises made to her by Muller. Though Muller was never in a position to actually promise her the job, Bolder may be held liable for his comments if the court decides that Muller's remarks were made within the scope of his agency. *See United States v. Rioux*, 97 F.3d 648, 661 (2d Cir. 1996) ("The declarant need not be the 'final decisionmaker' on employment matters for his statement on those matters to be deemed within the scope of his agency).

The Civil Rights Act provides that the plaintiff "present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m). Under the lowered threshold for mixed-motive claims (that the discriminatory reason be a motivating factor, rather than the entire motivation for a decision), it is possible that Simo could prevail on such a claim. As outlined above, recovery here would be limited to declaratory relief, injunctive relief, and attorney's fees. The court will not award damages nor issue an order requiring Simo's reinstatement. 42 U.S.C. § 2000e-5(g)(2)(B). *See also Desert Palace, Inc*, 539 U.S. 90 at 101.[2]

Conclusion

Though our client's exposure is not guaranteed, Simo may have a valid claim of employment discrimination for not receiving a promotion or for being discharged. Though it is difficult for her to prove that Bolder's legitimate reasons for his employment decisions are pretextual, due to specific comments made by Bolder, Simo may have a mixed-motive claim. The limited damages from such a claim would not expose Bolder to significant liability. As such, I recommend that Bolder move forward with the termination but advise him to consider negotiating the signing of a waiver of a right to sue as a part of a severance package.

[2] Simo could argue further evidence not explored here for expediency, including the relative qualifications between her and Moreland, Moreland's hiring process and its proximity to her maternity leave, and whether she was provided adequate accommodations to successfully perform her role.

LEAH MOTZKIN
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WRITING SAMPLE

Enclosed is an edited draft version of an amicus brief that I researched, wrote, and submitted on behalf of myself and Professor Philip Alston to the Inter-American Court of Human Rights. While the final version of the brief was edited by Professor Alston and translated into Spanish by attorneys at the Center for Reproductive Rights, this draft presents my own work. The brief advocates for the decriminalization of abortion in El Salvador in an ongoing case, *Manuela v. El Salvador*. To present the most streamlined version of the brief, I have removed the table of contents, certain portions of the introduction, and the conclusion.

SUMMARY OF ARGUMENTS

El Salvador's absolute abortion ban[1]—which experts describe as among the world's most restrictive—disproportionally harms poor and otherwise marginalized women.[2] The legal regime created by the ban and its enforcement led to Manuela's death and imperils many similarly-situated women.[3]

The situation in El Salvador is consistent with evidence from around the world, which shows that restrictive abortion laws tend to disproportionately affect marginalized women.[4] The factors of vulnerability that a woman faces, including living in poverty, are highly suggestive of the type of consequences she will suffer, if any, as a result of such laws. The severity of El Salvador's abortion ban, however, does more than create a class of women who are unable to access safe abortion, while those who are more privileged can—though that is the result of such laws globally, and El Salvador is no exception. The legal regime creates a class of women who may be subject to criminal prosecution for aggravated homicide, a criminal offense with sentences of up to 50 years in prison, as a result of suffering an obstetric emergency.

In this brief, we submit to the Court our understanding of how the discrimination that certain women face at every step in the ban's enforcement creates a class of women who are vulnerable to State abuse and punishment irrespective of their actions. For such women, the already traumatic experience of having a miscarriage may be the beginning of a litany of violations to the rights that they are guaranteed under international law. [5] For Manuela, this class membership was deadly. For those similarly situated, the risk is imminent as long as the abortion ban exists and will necessarily lead to further State abuses. Decriminalization of abortion is the only remedy that can stop Manuela's fate from befalling any other innocent woman.

THE ABORTION BAN DISPROPORTIONATELY ENDANGERS VULNERABLE WOMEN

Studies show that around the world, laws that restrict access to abortion do not stop women from seeking and having abortions. They do, however, prevent certain women from having safe access

[1] Articles 133-137 of the Salvadoran Penal Code create the absolute criminalization of abortion.
[2] "El Salvador has one of the world's most restrictive abortion laws. On April 20, 1998, a new penal code took effect, eliminating situations in which, abortion previously had been permitted, such as in cases where the pregnancy posed a risk to a woman's life, in cases of sex with a minor or rape, and cases of serious fetal deformities.6 Additionally, in January of 1999, article 1 of the Constitution was amended to recognize the right to life from the moment of conception." See Center for Reproductive Rights, "Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador's Total Criminalization of Abortion," May 30, 2014, p. 10, https://reproductiverights.org/document/report-on-the-effects-of-el-salvadors-total-criminalization-of-abortion?_ga=2.33690724.457327120.1560650670-559657739.1559788002.
[3] The absolute ban on abortion in itself and as enforced violate the Article 24 of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") guarantee of equal protection, as well as a variety of other protected rights. See below for further exploration of violations of Article 26 and Article 4 of the Convention.
[4] Marge Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, 2017 HEALTH AND HUMAN RIGHTS J. 13, 14.
[5] United Nations Committee on Economic, Social and Cultural Rights, Concluding observations on the combined third, fourth and fifth periodic reports of El Salvador, UN document E/C.12/SLV/CO/3-5, June 19, 2014, para. 22.

to the medical care they need and are entitled to.[6] The passage of Argentina's recent law on abortion demonstrates the extent to which there is a pressing need to balance concerns relating to the right to life with the reality that banning abortions is an ineffective and, in some respects, cruel way of promoting that goal.[7]

In El Salvador, the harm goes beyond the inability to access safe reproductive medical care, which in itself violates a woman's right to health and potentially her right to life. The absolute ban is promoted and policed in a way that incentivizes medical and legal professionals to put their own interests ahead of the rights to which all Salvadorans are entitled.[8] Women who find themselves in a situation similar to that of Manuela are denied the care and treatment that they need and are instead turned into objects of suspicion. They do not receive the medical treatment, the due process guarantees, or the respect to their personhood and autonomy that they are owed. The result is that women who are accused of having an abortion, and who will very often not have the resources to disprove such an allegation, risk being convicted for one of the most serious crimes in the civil code—aggravated homicide. It is young women from a particular socio-economic class who will overwhelmingly be the targets of all such prosecutions.[9]

One way for the Court to fully evaluate the harm that Manuela suffered is to apply a "differentiated approach"[10] that takes into account and evaluates how the women who are harmed by this law experience and are perceived by the world as a result of their identities and

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[6] SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo - Addendum - Follow-up mission to El Salvador*, PARA. 66, UN DOC. A/HRC/17/26/ADD.2 (FEB. 14, 2011); COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW), *Concluding Observations: El Salvador*, paras. 35-36, UN DOC. CEDAW/C/SLV/CO/7 (2008); COMMITTEE ON THE RIGHTS OF THE CHILD, (CRC), *Concluding Observations: El Salvador*, paras. 60, 61(d), UN Doc. CRC/C/SLV/Co/3-4 (2010); HRC, *Concluding Observations: El Salvador*, para. 14, UN Doc. CCPR/Co/78/SLV (2003); *El Salvador*, para. 10, UN Doc. ONUCCPR/C/SLV/Co/6 (2010).

[7] Daniel Politi & Ernesto Londoño, *Argentina Legalizes Abortion, a Milestone in a Conservative Region*, N.Y. TIMES, Dec. 30, 2020.

[8] The absolute abortion ban established in articles 133-137 work in concert with article 312 of the Salvadoran Penal Code, which classifies the failure to report an abortion as a criminal offense, and the protection of life and recognition of the human person from conception established in Article 1 of the Constitution creates the context that leads doctors to report women in order to avoid being fined or reported themselves for complicity or for failing to alert authorities. Penal Code of El Salvador, arts. 133, 134, 135, 136, 137, 312 (1998); Political Constitution of El Salvador, art. 1 (1998).

[9] Agrupación Ciudadana's 2014 investigation revealed that the women most affected by El Salvador's criminalization of abortion are young women from a lower socioeconomic class. Of the 129 cases they analyzed: 68.22% of the women were between the ages of 18 and 25; 6.98% were illiterate, 40.31% had some primary school education, 11.63% had high school degrees, and 4.65% had completed higher education (technical or university studies); 73.64% of the women were single; 57.36% of the accusations came from health professionals assisting the women and 22.48% from relatives and neighbors.; In 56.51% of the cases, the crime was identified as a homicide, which has serious repercussions vis-à-vis the principle of proportionality of punishment, because the women could have been convicted and sentenced to up to 50 years in prison. Center for Reproductive Rights, "Marginalized, Persecuted, and Imprisoned: The Effects of El Salvador's Total Criminalization of Abortion," May 30, 2014, https://reproductiverights.org/document/report-on-the-effects-of-el-salvadors-total-criminalization-of-abortion?_ga=2.33690724.457327120.1560650670-559657739.1559788002.

[10] Inter-American Court. Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *Preliminary objections, merits, reparations and costs*, Judgment of July 15, 2020. Series C No. 407, para. 68 (quoting Inter-American Court. *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *Preliminary objections, merits, reparations and costs*, Judgment of July 15, 2020. Series C No. 407, para. 289).

factors of vulnerability. The Court has conducted many analyses that explore how identities can compound to make marginalized individuals vulnerable to specific harms.[11]

By providing courts with a framework to examine how different factors of oppression can be evaluated separately and in conjunction with one another, the concept of intersectionality ensures that human rights will genuinely be interpreted as being "indivisible[,]interdependent and interrelated."[12] It also provides the Court with the "necessary perspective for establishing reparations that include, *inter alia*, appropriate measures of non-repetition that impose on the States conducts aimed at overcoming discrimination and the violation of rights."[13] This is an essential legal analytical tool in the human rights context because it generates a fuller understanding of how various forms of discrimination interact to create increased vulnerability.

While Manuela's discriminatory treatment was due to her status as a woman, it was also clearly a function of the fact that she was poor, young, single, and illiterate.[14] An examination of available data suggests that it is precisely single, poor, young women who are by far the most likely to be affected by the criminalization of abortion, given that overall rates of obstetric emergencies and abortions are not tied to demographic factors.[15] The most striking statistic in this regard is that private hospitals have never reported a suspected abortion.[16]

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[11] Inter-American Court. *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407. Inter-American Court; Case of Cuscul Pivarel et al. v. Guatemala. Preliminary objection, merits, reparations and costs,. Judgment of August 23, 2018; Inter-American Court. *Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations, and Costs.* Judgment of March 9, 2018. Series C No. 351, paras. 276-277; Inter-American Court. *Case of Gonzales Lluy et al. v. Ecuad*or. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 1, 2015. Series C No. 298, para. 290.

[12] Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

[13] Inter-American. Court. Concurring opinion of Judge Ricardo Pérez Manrique, *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs*. Judgment of July 15, 2020. Series C No. 407, para. 24.

[14] While some consider that discrimination based on multiple factors can be understood as separate from intersectionality, we consider that distinction theoretical. As the multiple factors of discrimination are also the factors that inform a person's intersectional identity, and in practice it is impossible to separate out an individual's lived experience of discrimination based on their identity, we advocate for the court to use an intersectional approach to any presence of multiple factors of discrimination. "Whatever the type of intersectional discrimination, the consequence is that different forms of discrimination are more often than not experienced simultaneously by marginalized women." *General Assembly of the United Nations. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/CONF.189/PC.3/5, 27 July 2001, paras. 23, 32.

[15] Women with financial means still can and do access abortions but do so by visiting private clinics. "It is only women who are already marginalized by the state in these other ways who must also risk their lives by going to a public hospital when they suffer complicated pregnancies or births" Jocelyn Viterna, Jose Santos Guardado Bautista, Silvia Ivette Juarez Barrios, & Alba Evelyn Cortez, Governance and the reversal of women's rights: The case of abortion in El Salvador (UNU-WIDER Working Paper No. 187 Series, 2017), women with financial means can still access abortions, therapeutic or otherwise, by attending private clinics.

[16] For more information on the dangerous affects this has on poor women who are thus likely to seek needed and life-saving healthcare, see *Id.*, at 14. "They were women who had, throughout their lives, been excluded from educational opportunities, access to basic health care services, and conditions that would have allowed them to change their social status. As a result, these women were extremely vulnerable and lacked the necessary tools to confront the state's authority. Moreover, as revealed in our interviews, criminal convictions and sentences are being given to women who, facing obstetric emergencies that lead to the loss of the fetus, do not understand the legal risks

While forms of discrimination based on poverty, youth, marital status and literacy are not specifically mentioned in the statuses specified in article 1(1) of the Convention, that list is indicative, rather than exhaustive or restrictive. There are strong grounds, however, for the reference to "any other social condition" to be read so as to allow such an analysis.[17] Though the Court considers "poverty" to be a state of special vulnerability rather than a condition,[18] that distinction should not preclude the Court from attaching significance to the role that poverty plays in exacerbating the harms that women face in El Salvador.

The Guiding Principles on Extreme Poverty and Human Rights provide that "[n]ot only is extreme poverty characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality."[19] The Court has in the past ruled on "(a) structural discrimination; (b) intersectional discrimination; (c) discrimination based on economic status – analyzed from the perspective of the 'poverty' of the victims, and (d) the content of the social rights that can be derived from Article 26 of the American Convention on Human Rights."[20] Adopting an intersectional analysis in the instant case will therefore appropriately require a consideration of each of these factors.

THE ABORTION BAN IS INCONSISTENT WITH THE STATE'S OBLIGATIONS TO ITS CITIZENS

It is clear from such an evaluation that certain women are more vulnerable to harm caused by the law, and that the harm they face can be severe and even deadly. The situation created by the legal system for such women in El Salvador is not compatible with the many of the guarantees provided by international human rights law.

The obligations imposed on a State through its guarantee of the right to life under Article 4 in conjunction with Article 26 include not only abstaining from implementing measures that, as was the case with Manuela, arbitrarily deprive citizens of their right to life, but also imposes positive

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of the situations they faced, lack the means to access private health care services that will not report them, and cannot afford adequate legal defense. Due to the fact that the majority of complaints come from medical personnel, women experiencing obstetric emergencies or in need of post abortion care may be afraid to seek medical help or support. This kind of social monitoring by medical personnel is problematic, because the majority of complaints are without basis. Even more seriously, such surveillance violates medical ethics and the principle of beneficence by violating professional confidentiality." For further reading on barriers to accessing maternal health services, see also, *IACHR. Access to Maternal Health Services from a Human Rights Perspective* (June 7, 2010), paras. 29, 33.

[17] *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239 para. 85; *Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs.* Judgment of March 8, 2018. Series C No. 349, para. 122.

[18] Inter-American Court. *Hacienda Brasil Verde Workers v. Brazil*, 2016, para. 26, 99; Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, Preliminary objections, merits, reparations and costs*, Judgment of July 15, 2020. Series C No. 407, paras. 57.

[19] UN, *Guiding Principles on Extreme Poverty and Human Rights,* adopted by the Human Rights Council, September 27, 2012, Resolution 21/11, Preface, para. 4.

[20] Inter-American Court. Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil*, *Preliminary objections, merits, reparations and costs*, Judgment of July 15, 2020. Series C No. 407, para. 68 (quoting Inter-American Court. *Case of the Workers of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brazil, (Preliminary objections, merits, reparations and costs*, para. 3).

obligations to ensure conditions that guarantee dignity, based on the concept of *vida digna*.[21] These guarantees include access to healthcare,[22] and humane detention conditions.[23] The legal regime that pressures doctors and nurses to be informants rather than caregivers cannot be considered to be consistent with this guarantee. Nor can a system of detention be considered humane when individuals can be imprisoned without regard to their culpability.[24]

While the treatment that Manuela received as the State investigated and later prosecuted her actions was particularly egregious, any inquiry into a personal tragedy of an obstetric emergency that is open to so much bias will be inconsistent with guarantees of equality. Only by acknowledging the role that stereotyping played in Manuela's abhorrent treatment is it possible to understand how a young woman, seeking medical treatment at an incredibly vulnerable moment of her life—after suffering an emergency and while going in and out of consciousness[25]—could be treated with suspicion and alarm rather than with the care and kindness owed to medical patients.[26] Throughout her prosecution, imprisonment, and until the day she died, Manuela never said or suggested that she had chosen to have an abortion, yet the State treated her as a criminal the entire time.[27]

For this to occur, it is clear that the State actors were not interacting with Manuela in the objective manner required, but rather on the basis of the biases they had towards marginalized women. The abortion ban's expansion of criminal liability to those who fail to report an abortion,[28] with particularly harsh penalties for medical professionals,[29] also must be understood as a factor that exacerbates this effect and incentivizes individuals to invoke stereotypical assumptions regardless of the complex realities that challenge the validity of such views.

As the Commission noted in its report on Manuela, "her guilt was presumed throughout the process based on a series of gender stereotypes."[30] This brief does not explore every way that

[21] Inter-American Court. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*. *Merits*. Judgment of November 19, 1999. Series C No. 63, para. 144; Inter-American Court. *Case of Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2012. Series C No. 257, para. 172. See for an application regarding the right to life of members of an indigenous community: Inter-American Court. *Case of the Yakye Axa Indigenous Community v. Paraguay*. *Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, paras. 167-168.
[22] Inter-American Court. *Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. 298, para. 190.
[23] Inter-American Court. *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, paras. 152-153.
[24] Further, Manuela waited for months to receive medical treatment and then received it only sporadically. This treatment cannot be squared with the guarantee of *vida digna*.
[25] IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, para. 77.
[26] While this Amicus brief does not explore this violation, this treatment violates the presumption of innocence until proven guilty as defined by Article 8(2) of the Convention and Article 12 of the Political Constitution of El Salvador.
[27] In this way, the State arguably violated Article 5(3) of the Convention, which reads, "punishment shall not be extended to any person other than the criminal."
[28] Penal Code of El Salvador, art. 312 (1998).
[29] Penal Code of El Salvador, art.135 (1998).
[30] IACHR, Report No. 153/18, Case 13.069. *Merits. Manuela and family. El Salvador*. December 7, 2018, para. 13.